Volume II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 439

UNITED STATES, APPELLANT,

vs.

THE BORDEN COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED SEPTEMBER 22, 1961
PROBABLE JURISDICTION NOTED DECEMBER 4, 1961

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 439

UNITED STATES, APPELLANT,

vs.

THE BORDEN COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Volume II

INDEX

	Original	Print
Record from the United States District Court for the Northern District of Illinois, Eastern Division—Continued		
Deposition of Herbert F. Taggart taken April 14 and 15, 1958—Continued		
Appearances—Continued		
Testimony of Herbert F. Taggart—cross (by Mr. Stevens)	99	687
Testimony of Herbert F. Taggart—cross (by Mr. Ball)	180	730
Testimony of Herbert F. Taggart—redirect (by Mr. Jinkinson)	208	745
Testimony of Herbert F. Taggart—redirect (by Mr. Long)	213	748
Testimony of Herbert F. Taggart—redirect (by Mr. Jinkinson)	225	755
Testimony of Herbert F. Taggart—recross (by Mr. Ball)	225	755
Testimony of Herbert F. Taggart—recross (by Mr. Stevens)	227	756
Testimony of Herbert F. Taggart—recross (by Mr. Hart)	232	759
Notary public's certificate (omitted in printing)	236a	
Stipulation as to signing depositions (Omitted in printing)	236c	
Taggart Deposition Exhibit No. 1—Cost Justification Report prepared by the Taggart Advisory Committee on Cost Justification, based on its two-year study	237	761
Taggart Deposition Exhibit No. 2—Documents for Review by Expert Witness	269	812

	Original	Print
Record from the United States District Court for the Northern District of Illinois, Eastern Division		
Deposition of Albert E. Sawyer taken April 16 and 17, 1958	1	813
Appearances	1	813
Testimony of Albert E. Sawyer—cross (by Mr. Ball)	3	814
Testimony of Albert E. Sawyer—cross (by Mr. Stevens)	115	869
Testimony of Albert E. Sawyer—cross (by Mr. White)	199	909
Testimony of Albert E. Sawyer—redirect (by Mr. Long)	200	910
Testimony of Albert E. Sawyer—recross (by Mr. Stevens	216	918
Testimony of Albert E. Sawyer—recross (by Mr. Hart)	221	921
Testimony of Albert E. Sawyer—recross (by Mr. White)	222	922
Notary public's certificate (Omitted in printing)	224	
Stipulation as to signing depositions (Omitted in printing)	225a	
Sawyer Deposition Exhibit No. 1—Excerpts from Article "Sacred Cows in Accounting" by Herbert F. Taggart, The Accounting Review, Volume 28, No. 3, July 1953	226	923
Record from the United States District Court for the Northern District of Illinois, Eastern Division		
Deposition of Otto F. Taylor taken April 28 and 29, 1958	1	926
Appearances	1	926
Testimony of Otto F. Taylor—cross (by Mr. Ball)	3	927
Testimony of Otto F. Taylor—cross (by Mr. Stevens)	68	963
Testimony of Otto F. Taylor—cross (by Mr. Ball)	172	1018
Testimony of Otto F. Taylor—redirect (by Mr. Long)	189	1027
Testimony of Otto F. Taylor—redirect (by Mr. Stevens)	198	1033
Testimony of Otto F. Taylor—recross (by Mr. ball)	207	1037
Testimony of Otto F. Taylor—redirect (by Mr. Long)	208	1038
Testimony of Otto F. Taylor—recross (by Mr. Ball)	209	1039
Testimony of Otto F. Taylor—recross (by Mr. Stevens)	209	1039
Notary public's certificate (Omitted in printing)	212	

	Original	Print
Record from the United States District Court for the Northern District of Illinois, Eastern Division		
Deposition of Elliott B. Woolley taken June 23, 1958	1	1040
Appearances	1	1040
Testimony of Elliott B. Woolley—cross (by Mr. Ball)	3	1041
Testimony of Elliott B. Woolley—redirect (by Mr. Long)	84	1083
Testimony of Elliott B. Woolley—recross (by Mr. Ball)	91	1087
Testimony of Elliott B. Woolley—redirect (by Mr. Long)	96	1089
Notary public's certificate (Omitted in printing)	97	
Record from the United States District Court for the Northern District of Illinois, Eastern Division		
Deposition of Elliott B. Woolley taken September 11, 1958	1	1090
Appearances	1	1090
Testimony of Elliott B. Woolley—cross (by Mr. Stevens)	3	1091
Testimony of Elliott B. Woolley—redirect (by Mr. Long)	198	1195
Testimony of Elliott B. Woolley—recross (by Mr. Ball)	203	1197
Testimony of Elliott B. Woolley—recross (by Mr. Stevens)	204	1198
Notary public's certificate (Omitted in printing)	205a	
Stipulation as to printing depositions (Omitted in printing)	205c	
Record from the United States District Court for the Northern District of Illinois, Eastern Division		
Deposition of Albert J. Bergfeld taken September 6 and 7, 1956	1	1200
Appearances	1	1200
Colloquy	2	1200
Testimony of Albert Joseph Bergfeld—cross (by Mr. Jinkinson)	8	1204
Notary Public's certificate (Omitted in printing)	184	
Order noting probable jurisdiction	186	1298

[fol. 98] In The United States District Court, Northern District of Illinois, Eastern Division

No. 51 C 947

United States of America, Plaintiff,

vs.

The Borden Company, et al., Defendants.

The deposition of Herbert F. Taggart was resumed, pursuant to adjournment at Room 756 at the United States Courthouse, Chicago, Illinois, at 9:30 o'clock a.m. April 15, 1958.

Present: Mr. Earl Jinkinson, Mr. Bertram Long, Mr. Stuart S. Ball, Mr. H. Blair White, Mr. Joseph Greaves, Mr. Edward L. Hart, Jr., Mr. John P. Stevens.

[fol. 99] Herbert F. Taggart, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination.

By Mr. Stevens:

Q. Professor Taggart, you have expressed an opinion that cost accounting is not an exact science, is that correct?

A. That has been expressed by me and a great many other people.

Q. That I take it is true of distribution cost analysis?

A. Yes, indeed.

Q. If anything, is it more true of distribution cost analysis than other types?

A. To a degree, yes.

Q. In selecting a method of allocating costs or selecting an appropriate service unit, is it correct that you draw on your knowledge of cost accounting principles and also on your knowledge of particular circumstances involved in the problem?

A. Well, I would think the major element would be the particular circumstances in the problem. That is, you do this in a factual setting.

Q. And is it sometimes true or has it been true in your [fol. 100] experience that you sometimes form an initial impression as to what is the most appropriate method of making a particular allocation and you sometimes change your opinion as you become more familiar with the detail and circumstances surrounding the problem?

A. Oh, this happens, yes.

Q. And it is not at all unusual for that to happen, is it?

A. Well, you are asking me to generalize in a field where generalization is pretty difficult but let us put it that I know of instances this has happened.

Q. Professor Taggart, have you made any cost studies in the dairy industry?

A. No.

Mr. Jinkinson: That is in this one.

Mr. Stevens: I think he has answered the question, "No."

By Mr. Stevens:

Q. Except for your work with the plaintiff in this case, have you done any advisory or consulting work for dairies in connection with the dairy industry?

A. No.

Q. Professor Taggart, do you know how many hours you devoted to the work that you did in connection with the preparation of your proposed direct testimony here, and [fol. 101] I don't mean to include your testimony yesterday or any meetings you may have had a day or two before that?

A. No. I testified yesterday that I had spent two pretty solid weeks in careful review of the materials that were furnished me and that a number of days following that in consulting with Mr. Woolley primarily about certain tentative conclusions that I have drawn, a clarification of some of the facts in an attempt to formulate what might be put into the document which we have been discussing.

Q. Was that the entire work you did in connection with this matter?

A. I think that is fair to say that it is.

Q. Did you ever have any occasion for billing purposes or any other purposes to determine just how many hours that covered?

A. Oh, I billed the government in accordance with the records that I keep.

Q. On an hourly basis? I am not interested in what the amount of the billing was, or what your rate was.

A. Surely, I understand. Yes, I think it is undoubtedly because some days I would not work full time and other days I did work full time, as a matter of fact.

[fol. 102] Q. I am just wondering if perhaps you do remember, and again I say I am not asking for the amount, if you do remember the amount of your bill, perhaps you could mentally divide it by your rate and thereby recall how many hours you did devote to the matter?

A. This is a very difficult computation.

Q. If you do not recall that is all right. I thought you might.

A. No. It was—I would say roughly an equivalent of three weeks, approximately what might be called full time work.

Q. You indicated yesterday that a list of the material that was left with you was prepared or given to you?

A. That is right.

Q. Do you have that list with you?

A. Yes.

Q. May I see it?

A. Yes.

Mr. Stevens: I would like to have the reporter mark this—why don't we start with a new series of numbers, Taggart Bowman Exhibit No. 2 for identification.

(Said document was marked as requested.)

By Mr. Stevens:

Q. Professor Taggart, directing your attention to Tag-[fol. 103] gart Bowman Exhibit 2 for identification, is that a complete list of the documents which were left with you when Mr. Woolley first visited you?

A. Well, my impression is that it is. I should hate to say that Mr. Woolley left nothing else, but at least he left these things.

Q. You don't recall anything in addition to that?

A. Nothing specific, that is correct.

Q. Do you know if the statements made in your proposed direct testimony were based on any documents that you can recall other than those listed on that exhibit?

Mr. Stevens: Just for the record I think I should clarify that. Whenever I referred to Professor Taggart's direct testimony I intend to be referring to the proposed direct testimony which is set out in writing in pages 5 through 8 of the government's proposed rebuttal as to the Bowman Dairy Company. That is all I am inquiring about.

The Witness: May I have that last question?

(The last question read as recorded above.)

By the Witness:

A. As far as I can recall on no other document.

Q. Who prepared Taggart's Exhibit 2 for identifica-
[fol. 104] tion?

A. I am not the one to answer that question.

Q. I mean did you prepare it or did someone give it to you with the documents?

A. Oh, they gave it to me.

Q. In other words it was delivered with the document?

A. Yes, that is right.

Q. At least insofar as your testimony pertains to the Bowman Dairy Company, is it fair to assume, Professor Taggart, that your proposed testimony is at least in part based on all of the documents which are listed there, which pertain to Bowman?

A. Well, I feel quite sure I took into consideration the things that I thought were pertinent.

Q. You did not select a certain group of documents and say, "This is what I am using for my"—and leave any others out?

A. Not intentionally.

Q. The first item is transcript Volume 8, civil trial, 51 C 947. I do not have that with me. I assume that is one

of the transcripts of the pretrial conference before Judge Campbell.

Mr. Stevens: Is that correct? I am asking the government.

[fol. 105] Mr. Long: That now generally is a transcript of the trial, the 1953 trial involving both the Sherman and the Clayton Act charges.

Mr. Stevens: That is a transcript, one day's proceeding at the original trial?

Mr. Long: Yes. That would be, yes, the day.

Mr. Stevens: I see.

Then, the Roman numeral II on this Taggart Exhibit 2 refers to government pretrial order for A Bowman and B Borden. With respect to A am I correct, Professor Taggart, and I will ask Mr. Long to check this with you if he will, I assume that refers to this document; namely, government's initial pretrial order?

Mr. Long: That is correct.

By Mr. Stevens:

Q. Is that your recollection, too, Professor Taggart, it was a copy of this document?

A. As far as I can recall, yes. I would have to look at the document carefully.

Q. Perhaps I can shorten this. Do you by any chance have the documents that were originally given to you?

A. No.

Q. Just for the purposes of identification?

[fol. 106] A. No, I doubt if I have any of them as a matter of fact.

Q. All right then. And a Roman numeral III, Bowman documents cost defense, a wholesale store account. The first document, let us say, is described "Manual". Would I be correct in believing that that was the document which has been identified in the proceeding as Bowman Exhibit 4 and sometimes referred to as the basic manual, and I show you a copy of that.

A. This I have studied, yes.

Q. The second item is called "Discount tests, March, 1955, September, 1955 and January, 1956" and I will ask you, Professor Taggart, if that refers to these three docu-

ments; namely, Bowman Exhibits 14, 15 and 16 which have previously been identified in the case?

A. Yes. That is correct.

Q. Now, the next item is government cost analysis, memos. The first one is A, July 10, 1956. First I would like to ask you, Professor Taggart, was that merely a copy of extracts from these documents?

A. Not as I recall, no.

Q. Did that document contain additional material?

A. Well, I think it contains some further analysis of material which was in the manual and these tests, as I [fol. 107] recall it. I can't—I would have to look at the document in order to be entirely sure what it contained but my impression is that it was certainly not a mere transcript of material that appeared in the Bowman document.

Q. Would the same be true with respect to Item B, February 6, 1957 revision?

A. This would be true, yes.

Q. Do you have those documents with you?

A. No, I am quite sure I do not.

Mr. Stevens: We would like to see those documents.

Mr. Long: I don't know whether—my feeling would be that that is not to be produced. They were work products here, Mr. Woolley's and the office's. We would object.

Mr. Ball: Let the record show that Borden joins in the request that these documents which were submitted to Professor Taggart and which were considered by him in the formulation of the opinions expressed by him in his direct testimony.

Mr. Long: Let the record show that we object to the tendering of these documents that Bowman and Borden on the basis of the fact that they constitute work products and to that extent would — privileged and also that [fol. 108] there would be no hardship on Bowman or Borden because, as I understand it, you are going to take Mr. Woolley's deposition at which time you will examine him in full with respect to his analysis of both the Bowman and the Borden cost which would be adequate.

Mr. Ball: Borden objects then to the admission of incompetent testimony on the opinions expressed by Professor Taggart on the ground that the basis of those opin-

ions cannot be properly ascertained without reference to and knowledge of the material that was in his hands at the time the opinions were formulated.

Mr. Hart: May I interrupt just a minute. I think before we get out further with this we ought to find out from Professor Taggart.

By Mr. Hart:

Q. Did you ever return these documents to the Government?

A. I am quite sure I returned all of them. I think those were my instructions and I am quite sure this is true.

Mr. Stevens: You have our request in any event.

[fol. 109] By Mr. Stevens:

Professor Taggart, did Mr. Woolley indicate to you that he prepared the documents to which you have just been referring?

A. These two government memos?

Q. July 10 and February 6 memos?

A. This is certainly the impression I had and I assume Mr. Wool-ey must have told me.

Q. Then, Item 4, referring to the Bergfeld deposition, Volume I and II, I take it that was a deposition that was taken here in this proceeding?

Mr. Long: Yes.

Mr. Stevens: We are, of course, referring to the man who supervised the Bowman cost study there, is that correct, Professor Taggart?

A. This is as I understand it.

Mr. Ball: Could we go off the record?

(Discussion had off the record.)

Mr. Ball: Let the record show that as far as Borden is concerned that it cannot consent to the closing of the deposition of Professor Taggart until an opportunity has been had to obtain a ruling from Judge Campbell upon the production of the material used by Professor Taggart in the formation of his opinion.

[fol. 110] Mr. Hart: I do not know what position we want to take on that by Bowman. We will go as far as we can with Professor Taggart. We may be perfectly willing to close the evidence at the end unless we feel there is something in these documents from the further questioning that we want to go into and then we might make the same objection.

Mr. Stevens: In any event we would like to go ahead with the examination and cover as much or more as we can while Professor Taggart is here.

By Mr. Stevens:

Q. The next item on the list, Professor Taggart, is B, bulk wholesale accounts, restaurant. And under that (1), Bowman cost analysis, March, 1956.

Do you recall what that document was?

A. I certainly don't recall it in any particular detail.

Q. Perhaps we can ask it this way:

Do you recall reviewing a document which was prepared by the cost accountant employed by Bowman dealing with delivery of dairy products to restaurants, hotels and bulk accounts?

A. I think I reviewed such a cost study, yes.

Q. I assume that would be that one listed there, under I. [fol. 111] Item C is Bowman proposed pretrial order, subject to revision.

Professor Taggart, do you have a copy of the proposed pretrial order as to Bowman that you examined?

A. I examined a copy of this document, yes.

Q. It would also be true you did not retain it?

A. I did not retain it.

Q. Did you ever see the final draft of the pretrial order as to the defendant Bowman?

A. I am quite sure I did not. If it was not in existence last June or July I have not seen it.

Q. And Item 4 relates exclusively to Borden, I take it so we do not have to go over that.

For example, this Item 2 that pertains only to Borden, does it not?

A. Well, it appears to.

Q. As far as you recall?

A. Yes.

Q. So that we have now reviewed all of the items pertaining to Bowman that you examined as best you can recall?

A. That is right.

Q. Now, I would like to direct your attention to a portion of the pretrial order entered on behalf of the Bowman [fol. 112] Dairy Company beginning with Paragraph 28 carrying through to and including Paragraph 34, which would be pages 19 and 26. I would like you if you would, please, Professor Taggart, to look through that material and tell me if you recall whether you ever saw that before or whether you read it?

A. Okay.

[fol. 113] Q. Are you in a position to answer the question now, Professor? The question was whether you had read that material.

A. I think I have not read that particular material. Some of the suggested possible testimony of Mr. Bergfeld there has a familiar sound, because I think some statements are similar to those that were in the original deposition; but a good deal of it is new.

Q. To the extent that it is not incorporated in the deposition of Mr. Bergfeld it would be new, is that correct?

A. I think that is true.

Q. And we are referring, just to be sure the record is clear, to the material beginning at the bottom of Page 19 with Paragraph No. 28 to and including Paragraph 35, which discusses Central Office Overhead, down to the bottom of Page 30?

A. That is right.

Q. So that except insofar as material incorporated herein is also found in the Bergfeld deposition, you could not have taken this into account in preparing your proposed direct testimony?

A. I think that is true.

Q. Professor Taggart, I do not see on the list of docu- [fol. 114] ments on Taggart Exhibit 2 any reference to the union contract. Do you recall when you first saw the union contract, or whether in fact you did see it, or merely were told about it?

A. Well, I am quite sure I have seen it at one time or another. As I recall, what I had was a positive photo-

static copy; but precisely when I got it and from whom, I cannot tell.

Q. Did you ever see any Bowman discount schedules?

A. Well, to the extent that they may have been included in some of these documents.

Q. Well—

A. Not otherwise, as far as I know.

Q. You were never given a separate group of a series of Bowman discount schedules, to the best of your recollection?

A. Not as far as I recall.

Q. Do you recall whether or not the Bowman discount schedule was a bracket discount schedule?

A. Well, would you explain what you mean by a bracket discount schedule?

Q. Well, let me put it this way: Do you recall what kind of a discount schedule the Bowman Dairy Company had [fol. 115] that you examined? I would rather have you define these things than try to do it myself.

A. Well, this is a pretty difficult thing to ask me to recall at this particular time, and especially in view of the fact that it is a little hard to keep Bowman and Borden completely straight in my mind.

I remember that they both offered discounts.

Q. Do you recall any striking difference between the types of schedules used by Borden and by Bowman?

A. Oh, I cannot say that I do as of this moment.

Q. Let me find what I believe you probably would have seen.

Professor Taggart, directing your attention to what has been identified as Exhibit 1 to the Government's initial supplemental pre trial order in this case, which purports to be a copy of a Bowman Dairy Company's retail store discount schedule, I will ask you if you reviewed that in connection with your study of the material?

A. I recall it now, yes.

Q. Now, do you recall whether that is similar or quite different to the type of schedule which was used by the Borden Dairy Company?

[fol. 116] A. Well, if I recall the Borden Dairy schedule correctly, there were about five steps, or something like that, five or six steps to it, whereas, to this there are a

considerably larger number of steps, or brackets, if you prefer.

Q. Was it your impression in reviewing this study, just taking an example at random, that a customer who purchased 35 points, in other words, midway between 30 and 40 points, received a discount of 4.2 per cent or 4.6 per cent, or what was your impression?

A. Well, if I remember rightly, the impression was that he would receive a discount proportioned between 4.2 and 4.6.

Q. But there was in effect a continuous sliding scale with increases in volume giving an increased discount?

A. Yes. I remember that gave me a good deal of trouble in trying to make some computations that I attempted to make.

Q. I will just leave that there. You may refer to it later. In addition to Mr. Wooley, did you confer with any other representatives of the plaintiff?

A. Mr. Jinkinson.

Q. Was he with Mr. Woolley on the first visit that Mr. Woolley made to you?

[fol. 117] A. Yes, he was.

Q. Then how long did that visit last?

A. Well, I think they were there just one day at that time, if I remember rightly.

Q. Now, I show you the transcript of proceedings in this matter, dated March 10, 1953, bearing a Volume No. 8, and for the most part it seems to contain the testimony of a Mr. Eggleston.

I will ask you if this is the transcript which they left with you when they were there.

A. I recall seeing this, yes.

Q. Did you read that transcript?

A. Well, I presume I did. I cannot say that I necessarily read all of it, but I read——

Q. Did you find that there is anything in that transcript that had anything to do with the assignment you were to perform for the Government?

A. It had a bearing, it seemed to me, on one particular matter, namely, a question as to whether relatively high-placed officials of Borden had direct dealings with some of the chain store customers.

Mr. Jinkinson: You mean Bowman?
The Witness: I am sorry, Bowman. I beg your pardon.

[fol. 118] By Mr. Stevens:

Q. During what period of time, do you know? Well, the record will show it.

A. Well, whatever period of time Mr. Eggleston was testifying about.

Q. Did the representatives of the Government indicate it might have any other value to you?

A. I don't think so.

Q. Did you have any discussions with Mr. Woolley or Mr. Jinkinson—I take it those are the only two representatives of the Government you talked to?

A. Until I came here to Chicago yesterday.

Q. Did you have any discussions with either of them as to the availability or non-availability of additional material that you might desire in connection with your study?

A. I do not recall any such discussion.

Q. Did you ever indicate to them that it would be helpful to you to obtain any additional material in order to form opinions on various aspects of this study?

A. I would hate to say yes or no to that question specifically. I could easily think of things that might have been useful in making a more exhaustive study than I did.

[fol. 119] Q. You mean you could think of such things now?

A. Yes, or I could have thought of them then.

Q. And I take it you did from time to time get information from Mr. Woolley orally about the dairy industry?

A. Oh, yes, very definitely.

Q. You did? And specifically, about the Bowman Dairy Company?

A. Oh, I have no doubt of that.

Q. Were you advised that the record in this case was in large part being stipulated, and that supporting data was being informally made available to the other side for review and examination?

A. I think I probably understood that, yes; that is, I understood that these depositions, and so on, for example, were being taken outside of Court, and that, obviously, they were available to both parties, and that proposed orders,

and what not, I do not know the lawyers' terms for these things——

Q. But, just for example, did you understand that the various underlying time studies and work papers and calculations that went into the basic manual on these various studies had been tendered to the Government for [fol. 120] their examination?

A. Oh, yes, I understood that very well.

Q. Either in these memoranda that are referred to on Taggart Exhibit 2, or else in oral discussions, did Mr. Woolley indicate to you the objections that he felt could probably be made to Bowman cost studies?

A. I think so, yes.

Q. And to the extent that you agreed with Mr. Woolley's suggested objections, are they incorporated in your proposed direct testimony?

A. I believe so.

Q. Does that apply to the Borden Dairy Company as well?

A. That is true.

Q. Now, I would like to refer to Page 6 of the Bowman order. I think Mr. Ball asked you about the similar language in the Borden order immediately after—do you have a copy for him?

Mr. Jinkinson: Yes.

By Mr. Stevens:

Q. (Continuing) The sentence which introduces the various lettered subparagraphs is what I have in mind, Professor. I just would like to ask you if you would [fol. 121] consider the proposed direct testimony which follows that sentence an adequate statement of the principles underlying a properly conceived system of distribution, cost accounting, and allocation compatible with the requirements of the Robinson-Patman Act?

A. Well, as applied to this particular situation, this is very possibly true.

Q. I was wondering if that is your language, that introductory sentence, whether that is something you testified to or is an introduction to your testimony?

A. Well, that appeared to be an introduction.

Q. So what you would say is what follows rather than that sentence itself?

A. I think so, yes.

Q. Professor Taggart, yesterday on the subject of platform costs, which is not allocated in the studies, I believe you in effect said that you had no knowledge of the dairy industry that would lead you to believe that a study of manufacturing costs would be particularly fruitful; is that a substantially accurate statement?

A. I think that is true.

Q. Do you have any knowledge of the dairy industry that leads you to believe that a study of the Central Office [fol. 122] expenses of the Bowman Dairy Company would be fruitful?

A. Not of the dairy industry specifically, but of industries generally.

Q. Professor Taggart, you wrote an article on the Standard Brands case some years ago——

A. I did.

Q. And it is my recollection that in that article you did not—First of all, it is my recollection that the cost study involved there contained no analysis of Central Office overhead, is that correct? Is that your recollection?

A. Yes, that is my recollection. I do not believe they included any home office costs.

Q. It is also my understanding of this rather long articles, so I won't try to read it all, that you did not criticize the cost study because of that omission, is that correct?

A. Well, that may be true. I would not say it wasn't; but that is a long article and it is difficult for me to remember it all, too.

Q. I will try to find the page on which you discussed that subject.

[fol. 123] Mr. Stevens: Off record, please.

(Discussion had off the record.)

By Mr. Stevens:

Q. Professor Taggart, I show you what purports to be your article on the Standard Brands case in the October 15, 1939 issue of the NACA Bulletin, and direct your atten-

tion to the bottom of Page 209 and over onto Page 210. I will ask you if that refreshes your recollection as to whether or not you criticized that study for omitting any discussion of Central Office overhead?

A. Now, what is the question?

(Question read by the reporter.)

By the Witness:

A. Well, it refreshes my recollection. My statements here with respect to Central Office overhead are somewhat cautious. Specifically, of course, the sentence which appears to me to be the key sentence is this:

> "In the case of the other items, that is, other than transportation from factories to agencies, and also other than the salaries and expenses of bakers' consultants——"

[fol. 124] I say:

> "In the case of the other items the cost of making the analysis and the many other uncertainties surrounding the results would probably give enough reasons for leaving them out."

Now, this is not an expression of approbation. It certainly is not an expression of disapproval, either.

Q. Do you indicate some reasons which would be valid reasons for leaving an analysis of Central overhead out?

A. Well, yes, unless they were offset by other reasons more particularly concerned with this matter. I am sure that whatever I said here was influenced to some extent by the fact that the Federal Trade Commission accountants, who are notoriously meticulous in these matters, had not raised any objection.

In other words, they had made a much more thorough first hand study of what Standard Brands had done than I had, and if they felt that it was not a matter of importance that these costs be analyzed and included in the study, then very possibly the reasons that I have suggested here are adequate.

[fol. 125] Q. Professor Taggart, how much time did you devote to the preparation of this article?

A. This article was published in 1939, which is nearly 20 years ago.

Q. Just in a general way. I appreciate you could not remember exactly.

A. I honestly have not much idea. It was certainly more than a few days, let's put it that way.

Q. Was it more than three weeks?

A. Probably less than six months without a doubt. I think it was very likely more than three weeks, because, for one thing, I remember I reviewed all the testimony in the case, which takes time.

Q. In Paragraph C of your proposed direct testimony you refer to an item of clerical time for billing, accounting and additional statistical services. Do you see Paragraph C at the bottom of Page 6?

A. Yes.

Q. Would you consider it a significant omission of a study if it could be demonstrated that the time required to bill the chains, the A&P and the Kroger Company, by Bowman could be shown to be less relatively than the time required to prepare and send individual rebate checks to all of the independent store customers who receive rebates? [fol. 126] A. Well, my attitude on that is that it has to be shown; that is, I would have to have some objective evidence, some explanation of the facts of the situation before I could come to the final conclusions.

Q. But if it were shown merely that the expense of sending the rebate checks to independents was relatively larger than the expense of billing the chains, would that be a sufficient showing to justify omission of the billing?

What I am asking is whether that would be enough, or would you have to make a detailed analysis to show just how much greater it was in order to say?

A. Well, my feeling would be offhand that would be sufficient to show that both things probably ought to be included. It seems obvious, for example, that if one element of Central Office overhead, so-called overhead, is included in the study, and there are other equally pertinent elements that ought to be included in the study, then both ought to be included.

Q. But I am asking if either were included? See, there is nothing in the study now pertaining to this matter of sending rebate checks to independents.

[fol. 127] A. As I recall, this is correct.

Q. Your suggestion, you would feel that both should be included? Is that your opinion?

A. Well, my feeling would be substantially this, that the billing costs probably ought to be included for the sake of completeness of the study, and it is certainly Bowman's privilege and, very possibly, their duty to include any offsetting costs that they might find in their exploration of Central Office operations.

This is very commonly done in studies of this sort.

Q. You also refer to the matter of executives and their office staffs in that subparagraph.

What procedure would you follow in allocating the salary of a president of the dairy between chains and independents?

A. Well, when you get up to the pres-ent, I am not entirely sure. I do not know what the pres-ent does. I would want to find out specifically what he did.

In the case of many corporation presidents, obviously, their duties are so general and so remote from any actual operations that there would be no particular point in including it at all.

Other presidents, however, are extremely active in sales [fol. 128] or production or some other specific aspect of the business, and it would be not at all unreasonable to associate costs of them and their office with the activities that they are primarily concerned with.

Q. Well, how would you take another executive, say, a sales manager, who deals with both chains and independents, and also with bulk customers and also with retail customers, and has people working under him; how would you allocate his salary and expense of maintaining his office?

A. Again remember, please, allocations of this sort cannot be made in a vacuum. They cannot be made in this room. They have to be made on the premises with the information that is available.

One thing that has to be looked at and has been used in analyses of this kind is a study of the correspondence files of such officials, a study of their travel records, their traveling expense accounts, which gives some indication as to the kind of activity that they indulge in.

Q. Of course here they are all right in Chicago.

A. Obviously, also, their own estimates are of some value. I should be reluctant to take an official's estimate [fol. 129] without any objective back-up unless it were the type of estimate which might have been made in the routine course of business for the company's own internal purposes of budgeting or cost control, or what have you, which, therefore, could not be said to have any conceivable bias.

Q. Well, assuming that you did have either a reliable estimate or some objective means of analyzing the work of such an executive, what yardstick would you use for apportioning his salary and other expenses, as between different customer groups?

A. Well, the key question here, it seems to me, is what particular customer contacts does this executive have? Does he contact chain store accounts, let us say, substantially, to the exclusion of independent accounts?

Does he contact some large accounts but fail to contact some small independent accounts?

These are questions that have to be asked first.

Now, to the extent that it can be determined by any method, that he has such contacts, then the cost of such contact, of course, becomes the cost of doing business with those customers.

[fol. 130] Q. Assume the executive has both kinds of contacts, with chains and with independents of varying sizes. Let us assume that to be the fact. What groups of independents do you use?

You notice on the Bowman discount schedule there is a sliding scale from zero up to some high figure. How do you assign independent costs as between different size groups?

A. Again, of course, you are trying to get me to make a cost analysis in a complete vacuum. I do not know the kind of evidence that is in front of me. I do not know the extent of his contacts, the character of them.

The information I should try to get certainly is whether there is any reason to suppose he contacts the, shall we say, upper levels and size of the independents more than the lower levels and, if so, is there any reasonable way of evaluating or measuring it?

Q. On the basis of the facts which you now have, you do not have an opinion as to how it should be done?

A. I cannot say definitely how it should be done, no. Of course not.

Q. Would the difficulty in selecting a reasonable yardstick be a valid reason for not attempting an allocation? [fol. 131] Perhaps not a sufficient reason, but just a valid reason to consider?

A. Well, it might be one of the reasons. It would, for example, have a bearing on the cost of the study. It might be, for example, that a yardstick actually exists if the accountants or cost analysts are sufficiently persistent in their efforts and have a sufficient budget to back them up. This is a practical consideration. This is not a theoretical consideration. It is purely a practical one.

Q. If a yardstick of time, allocating time of the executive were used for the executive's salary, would you think it proper to allocate the expenses of maintaining a stenographer in his office and his furniture on the same basis?

A. Broadly speaking, yes, I think so, sure.

Q. Would that be on the theory that the equipment and the supporting facilities which are needed to enable the executive to perform his task should be allocated on the same basis as the executives own salary should?

A. I think so.

Q. If the duties of the executive whose time we are [fol. 132] endeavoring to allocate or whose salary we are endeavoring to allocate, as between different customer groups could be shown to fluctuate substantially from time to time, so in some periods he might spend most of his time on production and other periods on chain store accounts and other periods on independents, so that his study might be unreliable for purposes of prediction over a long run period, would that be a valid reason—and again I am not asking or suggesting it is necessarily sufficient, but at least one valid reason for not making such a study of that particular executive's time?

A. Well, I do not think so. It would be a valid reason for not taking a time study of a single week, for example, to put one of Borden's stopwatch men in the corner of the executive's office to listen in on his conversations, this would be rather fruitless.

An executive in the nature of his job has broad overall duties. He turns his attention to the areas which demand his services at the time.

So that a limited time study of a day or a week, or even a month, would almost certainly be inadequate for this purpose.

Q. But even if you took into account all of the different [fol. 133] seasons of the year, it still might not be a basis for predicting what would happen in the future with respect to an executive, would it?

A. Well, it seems to me this way about that, is that if the data you have convinced you that you have the basis for a reasonable allocation for a given year, a 12-month period, then unless it could be shown that this year was for some reason or other an unrepresentative year, it does not seem to me that it would be unreasonable to say, "Well, this is it."

If, oh, you had a strike or all the cows got Bang's disease, or any one of a good many calamities might happen, obviously that would interfere with the executive's normal course of duties.

Q. Yesterday, Professor Taggart, you were asked about what you meant by maintaining customer accounts in this paragraph C, and I think you said you meant keeping them happy.

A. Well, that is a shorthand way of putting it.

Q. Now, I take it you do not intend to include such work as maintaining and improving the quality of the product, and things of that nature? I suppose that helps keep the customers happy.

A. Well, yes, of course, obviously it does, but that was [fol. 134] not the kind of thing I had in mind.

Q. I am wondering if what you had in mind was work which pertained specifically to one customer group and not to other customer groups?

A. No, not necessarily. I think you would have to keep all your customers happy.

Q. Well, say the executive's time is in some substantial part devoted to working out a price schedule or something which has an effect on all customer classes, how do you go about assigning that kind of work?

A. Well, I think that is part of his general duties in all probability. I would think that that should not necessarily be allocated to one customer group any more than to another.

Q. I want to be sure I understand you correctly. You said that should not necessarily be allocated?

A. Not necessarily, that is right.

Q. Now, on the subject of transportation expense, Professor Taggart, first of all are there any different methods of allocating transportation expenses which are recognized by cost accountants?

A. Depending on the type of transportation, the type of transportation expense, yes.

Q. It would not be your opinion that there is one method [fol. 135] which should be used in all types of industries in all types of circumstances?

A. It depends on how broadly you define the term "method."

Q. Pardon me.

A. It depends on how broadly you define the term "method." I am sorry.

Mr. Hart: Before we go into this, it is 11:00 o'clock now. Suppose we give the Professor five or ten minutes off.

(A short recess taken.)

By Mr. Stevens:

Q. Professor Taggart, we were discussing methods of allocating transportation expense. Would you indicate to me some of the different methods which you consider appropriate under varying circumstances?

A. Well, are you thinking of a Robinson-Patman study, allocation of transportation expense among customers, or are you thinking of product allocations, or——

Q. No, allocation among customers for Robinson-Patman purposes.

A. Of course, there are at least two basic kinds of transportation which might be involved. One is transportation by common carrier, or something resembling a common [fol. 136] carrier, where the charge would presumably be direct; that is, no allocation in the usual sense of that term

would be involved normally; even there, though, there might possibly be allocations.

If, for example, you had a pooled car involved, or something of that sort.

The other type of transportation, of course, is the type where the seller furnishes transportation through the use of his own trucks or trucks that he may rent, for example, which presumably are driven by his own employees, and where essentially you have a joint cost.

Here obviously allocations are necessary among the customers, that is, there can hardly be literally direct charging, unless, perchance, each trip of the truck relates only to one customer or perhaps to only one customer class. If each trip relates only to one customer or customer class, the problem of allocation is probably relatively simple, although even there there are basic allocation problems if the one truck is not used continuously and exclusively for the one customer or the one customer class. [fol. 137] But where transportation is supplied under circumstances similar to this, the general approach which seems to me most valid is an approach which would be based on the benefits which the various customers or customer classes receive from this transportation service.

Essentially, your truck is a rolling warehouse. I have a feeling that I stole that phrase from somebody; but there is much truth to it. If you have a stationary warehouse and you are trying to allocate the cost of that amongst customers, you naturally allocate it in terms of the customers' participation in the services which that warehouse performs, and those services are usually expressed in physical terms of some kind—square feet, cubic feet, some other measure of volume.

[fol. 138] Where you have a rolling warehouse, one that goes around from place to place, I see no essential difference.

Q. Well, Professor Taggart, I intended to ask you, I am afraid I did not phrase it very well, what different methods are appropriate under different circumstances for the allocation of transportation expense where the company owns its own trucks and trucks are used to deliver to more than one customer?

Are you suggesting that the only method which is ever appropriate is a volume method?

A. Maybe he better read that question back.

(The question was read.)

By the Witness:

A. Well, I think you want to add to that one further qualification, to more than one customer on a single trip.

By Mr. Stevens:

Q. And then you would say that a volume method is the method.

A. Well, my feeling is it is certainly the best method. It is the most sensible one.

Q. Would you ever use the ton mile method?

A. This takes into consideration, of course, both volume [fol. 139] and distance. There might be some circumstances under which distance would be an important factor. Frankly, I hesitate to try to imagine such circumstances, but I would not want to say that they did not exist.

Q. When you used the term volume in the proposed testimony, did you have reference to size or weight?

A. Well, I should think the answer will probably have to depend on what the limiting factor in loading the truck is, that is, does the truck carry so much because of the cubic content, the size of the material that it carries, or is the load limited primarily because of weight?

If the answer is one way it might point in one direction, but if the answer is another, it might point in a different direction.

Q. Do you know what the limiting factor is in the loading of a milk truck?

A. No, I don't.

Q. I take it, for example, if you had a truck load of feathers you would not use weight as a basis in that kind of an estimate.

A. Well, I might very well use weight for feathers if they were delivered some of them to one customer and some of them to another, but if you had a truck half full of [fol. 140] feathers and the rest filled with bars of lead, for

example, it does not seem to me necessarily that weight would be a correct factor.

Q. Well, Professor Taggart, what if you had a situation in which the truck was not filled to capacity, either in terms of weight or in terms of volume, but the time required for the driver to spend at each stop was so large that he was unable to take on any additional load, so the limiting factor was time.

Would time then be an appropriate possible method of allocating transportation costs?

A. I don't think so. The customer benefits from the operations of this truck in terms of the volume of goods that he receives, whether the volume is measured in weight or number of packages or cubic content, or some other way.

Q. Well, what if it could be shown that neither weight nor volume provided a limiting factor on the availability of the truck for additional delivery, which of those two factors would you then select as the yardstick?

A. Oh, which, I am not sure, and I do not know that it would make a tremendous lot of difference. It would make some difference, yes, but this is one of the points, it seems [fol. 141] to me, where a certain amount of discretion might be allowed.

I think I might make the analysis on both bases and see what they looked like.

If I may be permitted to add a slight comment, that might be one of the points that the committee was thinking about when they made the remarks somewhere in their report that the respondents should be allowed to choose a method which under circumstances where there truly is no basic logical choice, the method which is best suited for the purposes.

Q. Professor Taggart, at the bottom of page 7 and at the top of page 8 of the Bowman Exhibit 4, the basic manual, there is a description of certain types of services. The question I would like to ask you is, which of the groups of functions which are described on page 28 of the Taggart report you would place those services in, which comes closest? I appreciate you did not have those particular services in mind.

A. Well, as near as it comes under any, it could come under the broad heading of selling and technical services.

Q. And would you just tell me generally, referring to the Taggart report on page 28 again, what is referred to by the [fol. 142] subheading "Operating services"?

A. Well, I can read you what it says in the report.

Q. All right.

A. Which is certainly the best I can do:

> "The operating service includes the cost of sales office clerical work and administration of the physical aspects of the distribution operations."

Q. And that type of cost should be, according to page 28, treated as overhead of selling and technical service functions and allocated on the same basis?

A. This does not say this. I cannot agree that this says that it should be so treated. What it says is—what in effect it says, it may be so treated under certain circumstances.

Q. Professor Taggart, I would like to again refer to the standard brands article. There is a rather long discussion on pages 249 through 252 of what you have reference to as an outstanding example of understatement of the study. I think perhaps I will read it for the record so everyone can hear it. Perhaps that would be the best way. Then I can ask you a question or two about it.

> [fol. 143] "The outstanding example of understatement, however, is found in the analysis of route selling and delivery costs (See Tables 8 and 9 in the accompanying text.)
>
> "The driver-salesman's time, it will be remembered, was divided into two parts, stop time and other time. Stop time was assigned to the price brackets directly by means of time study over a 6-day period.
>
> "Other time was assigned to the brackets on the basis of pounds delivered to customers in each bracket. The contrast between the two time distributions is clearly shown in Table, 9 which shows, for example, that the 25-cent bracket was responsible for 52.05 per cent of the stop time, but only 23.35 per cent of other time.
>
> "Stop time was used for the bracket allocation of that part of driver-salesmen's salaries which was

paid for the time involved, and indirectly for about half of the salaries of route foremen, extra salesmen [fol. 144] and feeder men as well as the expense of route salesmen and route foremen.

"The result is that more than 50 per cent of the costs thus distributed are charged to the 25 cent bracket and only about 2½ per cent to the 14½ cent bracket, thus, the 25 cent bracket is charged with about twenty times as much of each cost as the 14½ cent bracket, or about forty times as much per pound of yeast, since the customers in the 14½ cent bracket bought about twice as much yeast as those in the 25 cent bracket.

"Other time was used as a basis for assignment of route salesmen salaries for the amount of time involved and for car costs and a portion of other salaries and expenses not allocated on the basis of stop time.

"This allocation basis resulted in charging less than 25 per cent of these costs to the 25 cent bracket, and about nine per cent to the 14½ cent bracket.

[fol. 145] "The small customers therefore received charges for only 2½ times as much of these costs as the large ones or about five times as much per pound of yeast."

Stopping there for one question, Professor Taggart, I take it this indicates the procedure followed in the Standard Brands study was substantially similar to the one you suggested be followed in your proposed testimony; in other words, there is a division between stop time, and other time which would be comparable to the service function, and the transportation expense?

A. I should think roughly this is true.

Q. I appreciate there would be qualifications.

Then going on:

"Standard Brands accountants could easily have found authority in Government publications and elsewhere for charging all route selling and delivery costs to customer brackets on the basis of stop time."

Now, that was your opinion at that time, I take it?

A. That is a statement that I made at that time.

Q. And you did, as a scholar, of course feel that there were Government publications and other authorities which [fol. 146] would justify that type of a——

A. I think I must have felt that way at that time. I should like to have the privilege, however, of calling attention to the fact that more recently in the course of reworking of this material I made a strenuous effort to find what I could have been referring to at that time, and I could not find it.

Q. When did you make this effort to find out what you were referring to?

A. Oh, within the past, well, certainly within the past six months.

Q. Was it in connection with this proceeding?

A. Oh, no, no; I am writing a book on this subject and I intend to include the account of the Standard Brands situation in that book. Just as a matter of recollecting some of the steps that I took and the statements I made there, I started hunting to find out what it was I was talking about, and to be perfectly honest with you, I could not find it.

I had an extensive library in this area and I do not know where that came from.

Q. You did in your article refer to that as the outstanding example of understatement in the study, is that not correct?

[fol. 147] A. Well, yes, but this again does not mean that I thought that they should have done it in some other way. It means only what it says, namely, that they could have done it in some other way and would have had some degree of authority, something that they could point to as justification for doing it that way.

Q. You concluded your discussion over on Page 52 with the sentence: "This decision—" that is, to adopt the procedure they did—"lends weight to Standard Brands' contention that no attempt was made to load the figures in such a way as to produce a wanted result."

Do you recall that?

A. Well, I think this is true, and I do not know, frankly, whether doing it some other way would have resulted in such loading or not. In other words, the method used is, you might say, an approved method. In fact, it was not

objected to in the slightest degree by the Federal Trade Commission accountants, so far as I recall.

Now, whether some other method which would have been more favorable to their point of view could have been used is, of course, a question, and I simply pointed out [fol. 148] at that point that here was at least one other method.

In fact, I think there were two other methods I suggested there for which they could have found some authority somewhere. This one particular one that you read to me I completely failed to find any source that I could have based that statement on.

[fol. 149] Q. Immediately after that sentence there is another sentence which says:

> "In point of fact they could have found examples of charging such costs on the basis of delivery calls unweighted by time."

You did make that statement?

A. This is correct. Such studies I did find.

Q. Is it not true, Professor Taggart, that a study based on stop time would be more conservative than one based on the number of calls, conservative in the sense it would not justify giving as large a discount.

A. Now, wait a minute. A study based on stop time would be more conservative?

Q. Than a study based on the number of delivery calls.

A. Oh, that is a difficult question to answer.

Q. Let me read you the next sentence. You say:

> "If they had relied on such authority—"

Referring to the basis of delivery call.

> "—and had used delivery stop time—"

Excuse me. No, I did not read that correctly.

A. I thought there was something wrong.

Q. I did not. I am sorry. But you would say there would be a precedent for the use of number of calls for this type of allocation?

A. Sort of a precedent, yes. The particular studies that [fol. 150] I observed were both studies of wholesale drug distribution.

Now, whether wholesale drug distribution sufficiently resembles Baker's Yeast distribution to justify using the same methods, frankly, I don't know; but there is a family resemblance, shall we say, in that both are wholesale distribution, at least.

Q. Now, Baker's Yeast field, was there a substantial amount of time spent in any type of in store service by the driver?

A. I can't remember. I really don't know about that.

Q. Let me turn to commissions for trading now, on page 8, subparagraph (h) and you indicate in that paragraph that "commissions would be essentially a direct charge exactly determinable for each customer on every route."

Could you amplify that a little bit, Professor Taggart? Do you mean that the commissions on a particular route would be charged against the customers on that route and commissions paid on another route would be charged against the customers on another route? Just what do you mean?

A. I should have to say that a driver's commission is certainly connected with a specific route and that driver's [fol. 151] compensation, be it salary or commission or what it is, is a cost of operating that route, it seems to me.

Q. So that if you had two routes, one of which carried commissions and the other did not, the cost of the commission on the commission route would be charged against the customers on that route and not against the customers on the route against which no commissions were paid?

A. That would seem reasonable.

Q. First of all you are aware of the fact that there is a volume level at which no commissions are paid up to a certain point?

A. This, I think, was referred to yesterday and I think I have understood this, yes.

Q. Supposing you had two routes, each of which had no commissions on them.

Mr. Ball: Excuse the interruption. I didn't cover this matter.

Mr. Stevens: Let us take the Union contract, the last page is torn off.

By Mr. Stevens:

Q. Just direct your attention to Article 42-A, subparagraph (e) and assume you had two routes each of which had 2400 points on it; then, therefore, no commissions were [fol. 152] payable on those routes and a customer is added to say Route A, because that driver has the time and these facilities to take on an additional customer on that ground because he is able to service his other customers in less time than the driver on Route B, would you say that the commissions applicable to the additional business that goes on Route A should be charged against the other customers that are easier to be served than it is on Route B?

A. Surely.

Q. Would you explain why?

A. Otherwise you would get into the impossible position of saying that the new customer is solely responsible for these commissions.

It is like the old simile the last man on the raft, is he the one that tips it over? Or is it the fact that the raft already has twenty-four people on it and he being number 25 overweights it?

Q. Assuming, Professor Taggart, that the twenty-four people on the raft, on the route that you do not add the customer to requires so much service that the driver does not have time to take on another account, whereas the twenty-four people on the route B which does get the additional load requires less service or are easier to serve [fol. 153] from the point of view of time and distance and everything else; therefore, the new customer can fit on that route and they both take exactly the same amount of merchandise, is it a correct analysis to say that the old customers on the route to which the addition is made are more costly to serve than the old customers on the other route?

A. They both may be equally costly conceivably. I don't know. I don't know whether that was included in your

assumption. They may be both equally costly to serve before this change in the situation was made. If so, the cost may be somewhat different after the change was made.

Q. Even though there is no change in what the driver does in the store with the particular customer?

A. You are getting into the marginal cost field. This was the subject of conversation during the consideration of the Robinson-Patman Act. One of the objects expressed by the advocates of the Robinson-Patman Act was that a new customer taken on who, for example, reduced his volume or added volume, reduced overhead which, of course, wouldn't be true in this particular instance should not get all the benefits of that reduction. Likewise he doubtless should not be charged with all the differential cost that is [fol. 154] involved.

You see both of these things are not involved here. It is impossible to say, in other words, that merely because a driver starts collecting a little commission because he takes on Joe's grocery to whom he has not previously delivered, it is impossible to say, in vacuum again, that this will alter basically the cost of delivering to the other customers. If you allocate to them a share of the total commission for which they are just as responsible as Joe's grocery, you also allocate to them somewhat a smaller amount of the fixed costs of operating this route. The two might well offset each other.

Q. You do not definitely allocate the cost to the additional customers entirely to the new customer? That is what you are saying?

A. This is correct.

Q. But I think you are saying, Professor Taggart, that an efficient route on which there is room for another customer may be penalized for that efficiency by having a new customer to put on the route whereas an inefficient route is certainly less costly because it does not get this additional burden.

A. I don't think efficiency or inefficiency enters into this [fol. 155] picture at all. They are completely irrelevant considerations.

Q. Efficiency in the sense time required to perform the job required by the customers on the rural routes?

A. Getting into a lot of speculation there it seems to me is pretty difficult to deal with and again in a vacuum but I will not agree for a moment that the added cost which is incurred because a customer is added to a route is solely under these circumstances a cost of serving that particular customer. It is not true.

Q. I have not asked you to agree to that, Professor Taggart.

A. No.

Q. You are saying it is a cost which should be assigned to that particular route.

A. Well, to the route I have no objection. It is a cost of the route. It is a direct charge. You cannot blink that in the slightest degree.

Q. Did Mr. Woolley ever show you the method in which he allocated commission cost when he made a study of this subject matter?

A. Well, I would guess maybe he did, but I don't recall for sure. It may have been contained in some of these memos we have been talking about.

[fol. 156] Q. Professor Taggart, let us see at page 17 of the Taggart report, do you have a copy?

Mr. Jinkinson: We could get him one right here.

The Witness: I have one.

Mr. Jinkinson: You have one.

By Mr. Stevens:

Q. The second paragraph which deals with direct cost varying the sales price and I wanted to call your attention to the last sentence in that paragraph which shows, if for example the differing sales commission costs per unit could be shown not to be a proper reflection of the time and effort expended in selling to different customers and classes of customers, such cost differences would not be acceptable but a more precise method of allocating sales commission should be utilized.

Is that a sentence with which you are in agreement?

A. Yes, surely.

Q. Would you give us an example—do I understand from that that there are occasions in which a method other than a direct charging of a commission to different cus-

tomer classes should be used for allocating sales commissions to different customer classes?

A. It is conceivable.

Q. Those would be instances where the time and effort [fol. 157] expended selling to the different classes of customers did not correspond to the commission payments?

A. I once dreamed up an example. As a matter of fact there isn't any practical example; frankly, but in an article, the title of which was read by, I believe it was Mr. Ball yesterday, if I recall.

Q. The sacred cows?

A. Sacred cows in accounting. I dreamed up a very unusual example where, if I recall rightly, the salesman was paid strictly on a commission basis but was directed by his employer to do something which was presumably inimical to his earning power. The employer for reasons of policy, if I remember this example correctly, thought that every possible customer for his particular product, should be contacted by a salesman regardless of whether the customer, whether the contact was a profitable contact either to the employer or to the salesman, the salesman is directed to do this. It seems to me that in a situa- [fol. 158] tion of that sort consideration might be given to some other method of allocating the commission.

Q. In the example that you use, I believe you indicated that the salesman got five per cent or something like that and he adds an account which was a regular account that was easy to call on and the volume was substantial, so that there was a substantial commission earned from that account very easily and he was required by the company also to call on a number of less expensive, I mean lower volume accounts, and to spend relatively more time and earned very little from those accounts.

A. I think I confined it to some one particular exceptional low volume account. I have forgotten exactly the details. What I was trying to do was to search the thing around in such a way that you had a reasonably clear case for this sort of thing.

Frankly under those circumstances a straight commission method of payment is possibly unfair to the employee, but a straight commission to sales employees is somewhat unusual.

Q. In those situations or in the hypothetical situation in which a company in effect gave the salesman some very [fol. 159] profitable business and then required him to perform less profitable duties, the direct charging of the commission would not be a fair method of allocating this commission cost, would it?

A. It might not be.

Q. Is there any reason why the same reasoning would not apply to delivery wages where the commissions are paid?

A. Well, it might apply under certain circumstances, yes.

Q. Let me just read this example into the record so we have what we are talking about, and again I wasn't able to get the article itself and I took some notes and I will read them and they will be subject to revision later.

In the article on Sacred Cows which is found in the Accounting Review, Volume 28, No. 3, July, 1953, my notes indicate that you stated the following: You have been in- [fol. 160] dicating before that allocations are difficult to make at times.

> "So important is this point that another example seems desirable. In the field of distribution cost analysis are found some of the most perplexing of cost accounting situations. Joint costs are particularly prevalent. In the allocation of salesmen's compensation among products and customers it is generally agreed that time spent, if ascertainable, is an important factor. The measurement of time of salesmen is a matter of no small difficulty, and resort is therefore had to other expedients, such as the unweighted number of calls in the case of customer analysis or gross margin in the case of product analysis. Where salesmen are paid on a commission basis, almost all writers on the subject seize upon the commissions as the ideal basis for cost allocations. It is assumed that outward appearances furnish an entirely adequate basis for solving a complex problem.
>
> "Assume, however, that the Universal Coffee Company, which pays its salesmen a flat 5% commission [fol. 161] on all sales, follows the policy of requiring them to call on all grocers, however large or small,

and wherever they may be found, in order to get truly universal distribution for its 'Universal' brand of coffee. Salesman A calls on Joe's Supermarket, located in the middle of town. Joe is an old customer. He does not need to be educated in the merits of Universal, and needs no merchandising assistance. He buys 1,000 pounds a week at 50¢ a pound, and A's commission is $25.00. His weekly call takes 15 minutes, including travel time. The Hayseed Corners Grocery, on the other hand, is located ten miles outside of town, and five miles off the main road. Its capacity to sell coffee is limited and the proprietor is indifferent to the advantages of Universal. After A has driven out to this store and has spent a full half hour showing the storekeeper how to display Universal Coffee to better advantage, the weekly order is ten pounds, and the commission is 25¢. Query: Does it really cost 100 times as much to obtain the business from Joe's Supermarket as that from Hayseed Cor- [fol. 162] ners? The answer clearly is in the negative, and yet this is the result which is produced when the salesman's compensation is allocated by the obvious method."

Is that the example you referred to?

A. That is the example I was referring to. Thank you for refreshing my recollection.

Q. If in this example a large customer was dropped so that the $25.00 commission that was previously charged to him was eliminated, would it be hard to say that that $25.00 amount should not be charged entirely to that customer?

A. Again you are talking about the marginal situation, the incremental cost of adding a customer or subtracting a customer. This isn't pertinent.

Q. It would not be chargeable to that customer.

Well, Professor Taggart, what did you mean in the last, paragraph (h) of your proposed testimony? I am sorry, do you have it there? Begin with this.

Mr. Jinkinson: The question is what did he mean, in what way. Don't you?

Q. The last question?

A. You asked me what I meant. I think the last two sentences should be read together. The two will help [fol. 163] to clarify the one. To justify allocating commissions on any other basis; namely, any other basis than volume, would require a definite showing that such direct charge produces inequitable or illogical results. If an expense is such that it can be eliminated, if the customers were dropped it is hard to say that it is not a specific cost to that customer.

That simply means the presumption is in favor of an allocation of a cost of this sort on a volume basis; that if you are going to allocate it on some other basis you have to show that and the presumption, of course, is because of this last sentence; if you are going to allocate it on some other basis then we have to show that the results produced would be illogical or inequitable.

We went around and around with the—I say we. I am sorry. The attorneys for the Sylvania Electric Products Company went around and around with the accountants for the Federal Trade Commission on this very point in the Sylvania case, the Sylvania attorneys taking the position that a cost, which in that case happened to be royalties based on dollar sales, on the dollar amount of sales, was properly allocable to the customer classes to whom the sales were made and we got varying expressions [fol. 164] of opinion—I beg your pardon, the attorneys got varying expressions of opinion as to the theoretical or philosophical aspects of this question.

Q. Well——

A. There was some disposition on the part of the commission accountants to try to see circumstances under which such payments would not be allocable by straight volume basis but they had a great deal of difficulty in trying to pose situations in which this would be true.

Q. Professor Taggart, it is probably my lack of understanding but I frankly am puzzled by the language in this last sentence. It does not seem to be consistent with what you are saying. If expense is such it can be eliminated if the customer is dropped and this is customers; I think it should be singular. For example, on the two routes we take one customer out and we drop him and we

remove the commission. You go on and say it is hard to say that it is not a specific cost to that customer. I take it you don't mean to say that the cost should be charged to the one customer who is being dropped and thereby eliminating the cost?

A. Well, the practical fact is if the particular customer is dropped the particular incremental cost that is [fol. 165] involved serving him will also depart from the scene.

Now, this simply means that it is pretty difficult as a practical proposition to take any position other than that volume is a proper basis for allocation of such cost.

Q. Then, Professor Taggart, wouldn't that sentence read more closely to what you're saying now if you eliminated the word "not" from the last line? It is hard to say it is a specific cost to that customer.

A. Well, I can't agree with you.

Q. Let me put it this way without regard to the language. In our hypothetical example we take one man off the route and thereby eliminate the commission expense.

A. Take one customer off the route?

Q. One customer off the route.

A. Yes.

Q. Would the commission expense be a specific cost to that customer?

A. This is specific expense which is eliminated as the result of eliminating that customer.

Q. Is it a specific cost to that customer within the intendment of this last sentence of paragraph (h)?

A. Well, not in the sense that if you were trying to de- [fol. 166] termine the cost of serving every customer on that route that this particular customer would happen to be charged with this entire commission, not in that sense at all.

Q. Is that the sense in which the words are used in that sentence?

A. I tried to explain my position as completely as I can.

Q. Again, I tried to understand this paragraph, Professor Taggart, is the entire paragraph predicated on the assumption which is stated in the first sentence where

it is indicated that drivers do exercise some influence on the volume delivery.

Is that merely an assumption which goes to the first sentence?

A. I think it is probably predicated on that, the entire paragraph.

Q. Now, turning our attention to chain stores as distinguished from independent stores, was any information given to you in any of this material or any of the oral discussions which indicates to you that the driver of the milk truck has any influence on the volume of milk which is purchased by the Great Atlantic and Pacific Tea Company from the Bowman Dairy Company?

[fol. 167] A. Well, discussion have not been very definite on this point. I have obtained the general impression that the driver was less likely to be able to influence the manager of an A & P store, for instance than he might the owner of an independent. I think this stands to reason, because the managers of an A & P store are employee-and governed by company policy.

Q. Are you also aware of the fact, Professor Taggart, that the driver for the chain store does not go into the store and put the merchandise in the case. I think that affects the work he does in the independent store.

A. I have forgotten whether I knew that or not, frankly.

Mr. Jinkinson: Let us go on the record so that I can state my position clearly, Mr. Ball. The position of the government, of course, is this: That we consider any papers that Mr. Woolley has drafted or drawn that we shall claim the privilege that we, of course, will not offer them.

Mr. Ball: I thank you for your statement of position.

Mr. Jinkinson: I don't think there is any question. That is the question we will argue to the Court many ways.

[fol. 168] Mr. Ball: I have no questions about the fact that you may wish to claim the privilege if the privilege exists or not. That is correct. I am not so concerned with whether the privilege exists as I think it does have a very definite bearing on the identity of the expert when we are denied an opportunity to examine the basis of his work.

Mr. Jinkinson: Of course the record will show that you are not being denied the examination of the witness as to anything that he has seen or heard or anything else. What

you are calling attention to is to examine the work of Mr. Woolley which is a different proposition entirely.

Mr. Hart: No, don't misunderstand us. It is a work product perhaps of Mr. Woolley but it was turned over to this witness on the basis of his examination.

Mr. Jinkinson: No, I don't think he used it for formulating the opinion. He had it. I don't think anything is going to influence Dr. Taggart's opinion. I think even a reading of the government's proposed rebuttal order would show that Mr. Woolley and Mr. Taggart are not at all on all fours on this subject.

Mr. Hart: I think Professor Taggart has sufficiently oftenly said in the course of the record, "That I can't [fols. 169-170] decide these things in a vacuum"; or anything that gave him less of a vacuum that he might start out with he probably reiterated assiduously.

Mr. Stevens: Well, I don't think that I want to call Mr. Woolley a vacuum.

Mr. Ball: I think it is as clear, Mr. Jinkinson, that it is a matter we will have to submit to the Court, because we think that the business kind of qualifies it that in order to make that point sufficient we are going to have to test out the problem of whether you should be required to provide them.

Mr. Jinkinson: Of course, I think, Mr. Ball, you have a perfect right to do so. Of course I suppose you will wind up by arguing it and Judge Campbell to rule on it.

Mr. Hart: Do you want to suspend now until 1:30?

Mr. Jinkinson: Shall we suspend until 1:30?

Mr. Stevens: Why don't we do that. I think we are almost there.

(Whereupon at 12:30 o'clock p.m. a recess was taken until 1:30 p.m. of the same day, April 15, 1958.)

[fol. 171] HERBERT F. TAGGART, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-examination (Continued).

By Mr. Stevens:

Q. Professor Taggart, do you recall how Bowman allocated transportation expense in this study?

A. If I remember rightly Bowman ascertained the amount of time spent at customers' premises and then allocated substantially everything on the basis of that time.

Q. When you referred to transportation cost in the proposed testimony, what various items did you include in that category?

A. Well, all the cost of operating the truck, including gasoline, oil, repairs, tires, depreciation, insurance, taxes.

Q. Yes.

A. Whatever is involved in keeping the truck running, plus the proportion of the driver's time essentially involved in the same thing; that is, namely, actually driving the truck or preparing to drive the truck.

Q. Do you know—excuse me.

A. The time which he would spend, if he spent essentially [fol. 172] no time to his customers at the premises.

Q. Do you have any recollection of what percentage of the driver's time is spent in the transportation aspect of his activities rather than the service aspect?

A. I have no recollection, no.

Q. Would you include the expense of licenses also included in transportation costs?

A. Yes, yes.

Q. What is the connection between this item and depreciation of the truck and the volume of goods carried on the truck?

A. The connection is the one that I described this morning; namely, that the truck is a rolling warehouse and that all costs appertaining to that truck, keeping it going, should be distributed among the customers in proportion to their—to the benefits which they derive from the fact that this truck containing the product gets around from place to place.

Q. Would you have the same opinion even if the volume carried on the truck had little or no effect on the amount of depreciation which the truck had?

A. This is absolutely correct, yes, sir.

Q. And I take it that you would not suggest that there is any direct relationship between the amount of gas and oil [fol. 173] consumed by the truck and the volume carried by the truck?

A. Relatively little.

Q. And the same would be true for the cost of the tires and these other items you just indicated?

A. Of course we went through that yesterday, you remember where I pointed out that for certain purposes the cost of operating this truck is a fixed cost or substantially so. I did that in some of my writings that Mr. Ball called my attention to.

Q. What do you mean by a fixed cost, the depreciation being a fixed cost, Mr. Taggart?

A. The cost does not vary because of the fact that a truck carries more or less of a product. In fact the way depreciation is usually figured it does not vary even whether the truck runs or it doesn't run. There is almost always depreciation figured on a straight line basis.

Q. Depreciation is figured on a time basis?

A. Generally speaking, yes.

Q. Isn't that also true with respect to license expense?

A. Oh, yes, sure the license is good for a year. The insurance would be paid for a year, for a long period of time. [fol. 174] Q. If this truck spends, let us say, half of its time sitting out in front of a particular store because it is required to be there in order for the merchandise to be delivered and service performed in the store, wouldn't you find some connection between the service time required during which this truck is parked there and this item of depreciation expense?

A. Oh, no very important connection.

Q. Professor Taggart, supposing you had a—I am trying to get a different kind of product. You talked about different products. Supposing you had a problem of delivering a, say jewelry, diamonds to various retail establishments and the delivery man or salesman who brought the merchandise around was required to spend a very large

proportion of his time, say seventy-five or eighty per cent of his time in the store explaining to the retail merchant how to display the merchandise and how to polish it and how to price certain things of that nature, how would you on such fact allocate the expense of maintaining a vehicle that this salesman must use to deliver the diamonds or whatever article it is?

A. Of course in the first place the vehicle in that case is [fol. 175] not a truck. It is an automobile, might be Volkswagen. The difference in physical volume among customers would be in all probability so small it would hardly be worthwhile worrying about this.

Q. I appreciate the volume would not be an appropriate measure there. I am asking you what would be an appropriate measure there?

A. Well, I can't be absolutely sure. Again let us refer to the vacuum and there is a considerable vacuum around your assumption. It seems to me that you might be able to make an argument there to the effect that since transportation, the transportation function as far as the merchandise is concerned is of very minor importance, that perhaps a stop basis might be satisfactory as a basis for applying the car cost and possibly the time of the driver while he was driving the car. I don't know.

Q. Would it be not unreasonable to use a stop time basis?

A. Well, I am not sure that I would. It would be questionable. But again let me reiterate what I have said before. It is very difficult to set up a complete set of assumptions, complete enough so that any reasonable individual can give a categorical answer to a question like the [fol. 176] one you are asking me.

Q. I appreciate that. I am merely trying to ascertain whether or not you think it might be the only permissible basis, depending on all the other facts and circumstances that might bear on the subject, of course.

A. I would be inclined to hesitate. I would have to think about it. I would have to study the facts and factors involved much more closely than I can sitting here.

Q. In the hypothetical example which I suggest I was assuming that the salesman or delivery man whoever we are going to call him was spending the major portion of his time in the store, say seventy-five or eighty per cent

of his time. Would not such a fact if it did exist be a reason which would tend to make the stop time basis more appropriate than if he spent less time in the store?

A. I don't think so at all.

Q. You would not think so?

A. I would think the contrary, if anything.

Q. Would you explain the basis for that statement?

A. Well, while he is in the store he is a salesman and he is a technician or something of that sort. If he spends that length of time in the store it is because he has a service to [fol. 177] offer which has nothing to do whatever with the delivery of diamonds but it is due to his specialized knowledge of the kind of merchandise that he is dealing with.

His function as a delivery man is purely incidental in a situation of that sort.

Now, granted that there is some cost there which has to be allocated, it doesn't mean that it should be allocated necessarily on the basis of time spent by him, not in delivery, but in offering some kind of advice or expert assistance to whatever it might be.

Q. You would say in that situation his function as a delivery man would be purely incidental because such a very large proportion of his time was spent inside the store?

A. His function as a delivery man?

Q. Yes.

A. Yes.

Q. Now, it is true that in this Taggart report the operating service which we referred to is suggested may be treated with all overhead in selling of technical service and allocated on the same basis. You are suggesting that although operating service may be so treated the cost from providing this hypothetical salesman or delivery man with a vehicle couldn't be so treated?

[fol. 178] A. Well, I would certainly question it, yes.

Q. And your reason for treating the portion of a milkman's compensation which represents the portion of his time in driving to and from stores as distinguished from the in store time as transportation expense because you regard him primarily as a delivery man rather than primarily as a service man.

A. Well, let us put it this way: It is more important to

treat his transportation correctly perhaps than it is this hypothetical diamond salesman that you are talking about. I am not sure about that again and possibly that is true. That is, the greater the proportion of his time is spent in driving a vehicle than the greater the amount of cost involved, and obviously the more careful you have to be in allocating.

Q. Is there any point at which the proportion of time in the store would become large enough that you would regard it proper to treat all of his salary as attached to the service function rather than the driving function?

A. All of his salary?

Q. Yes.

A. Oh, this could happen I should think. Again you [fol. 179] would have to do a lot of speculating and a lot of assuming but if say ninety-eight per cent of his time was in the customer's premises and only two per cent of his time on the road I would think it pretty largely a matter of indifference as to how you would allocate the two per cent.

Q. If say eighty per cent of his time was in the customer's premises and twenty on the road, you would think it improper to allocate his entire salary on the basis of stop time?

A. Well, I am sure this gets into the area where I would call it into question without any doubt.

Q. Professor Taggart, do you have any information as to the frequency of change in the composition of milk routes?

A. No.

Q. In other words do you know how regularly a given driver serves the same customers how often those customers change on his round, or anything like that?

A. All I know is the same milk route drivers had been serving the Taggart family for the last twelve years I am sure of and maybe more than that.

Q. You do not operate a grocery store, I take it?

A. No, I don't.

Mr. Stevens: Thank you, Professor Taggart. I am [fol. 180] through.

Mr. Ball: May I have the Taggart deposition No. 2, the exhibit?

Cross-examination.

By Mr. Ball:

Q. Professor Taggart, looking again at Taggart Exhibit No. 2, I notice that you were furnished, among other matters, with a government's memo, cost defense analysis September 25, 1956.

You did receive that?

A. I am sure I did, yes.

Q. And that was one of the matters that you considered in reaching the opinion expressed in your testimony?

A. That is one of the matters that I looked at as I looked at these other things.

Q. In preparing your testimony?

A. That is correct.

Q. Now, I want to ask you if it isn't true that it is impossible for you to have kept the fact relative to Borden separate from the fact relative to Bowman in your consideration of your opinion with respect to the Borden order?

A. Well, I made every effort in my study of this thing [fol. 181] at the time I studied it to keep these documents separate. So that I arrived at my conclusions with respect to Borden and then I arrived at my conclusions with respect to Bowman, or it might have been the other way around.

Q. But there were certain facts that might be relevant to the method at which the milk business was conducted that appeared in one that would have affected your judgment with respect to the other, isn't that correct?

A. Well, there are certain generalized facts with respect to the milk business I would assume would be more or less identical. It would not matter whether it is Borden or Bowman.

Q. No doubt you made some of those attempts in this consideration?

A. I would not be at all surprised, surely.

Q. How long a memo was this government memo of the cost defense analysis?

A. I haven't the slightest idea.

Q. You have no recollection whether it was fifteen or fifty pages?

A. Well, if I had to guess I would say it was closer to fifteen than fifty.

[fol. 182] Q. Somewhere between the two?

A. I think that is a fair estimate. I might be wrong, yes.

Q. Again as far as you recall in the list appearing on the Taggart deposition, Exhibit No. 2, are all of the documents that were furnished you by the government in your preparation of your testimony?

A. At that time last summer, that is right.

Q. You recall of no others that were furnished you any later date?

A. Well, I saw some material at a later date at the time that this—what do you call it?

Mr. Long: Proposed rebuttal.

The Witness: Proposed rebuttal.

By Mr. Ball:

Q. Our proposed order, yes.

A. Proposed order?

Q. What was this material?

A. Well, as I recall, for one thing I am quite sure that there was a copy of this contract among the things I saw there but whether I had seen the driver's contract before that I frankly can't remember.

Q. Do you recall whether there was some tabulations prepared by Mr. Woolley that went along with that supplemental memorandum?

[fol. 183] A. Oh, yes. Mr. Woolley had prepared some tabulations, some charts, and this and that which I saw.

Q. And you had that in mind, and did you have that in mind at the time you prepared this testimony?

A. Well, remember that when I saw this, those documents, this was all in the form we see it now.

Q. Oh! But that entered into, and it has perhaps colored the opinions you have expressed here in your testimony?

A. Oh, I doubt if it has to amount to anything.

Q. Do you recall what it was that appeared on that data in any detail at all?

A. No, no.

Q. Now, you said—what did you say, two or three weeks—no, three or four days with Mr. Woolley for discussion?

A. He came there to Ann Arbor and I forget whether it was three days, four days, some such length of time.

[fol. 184] Q. How long was Mr. Jinkinson with him?

A. As far as I recall, Mr. Jinkinson was there just one day, and how long he was there that day I was not sure. I doubt if it was more than half a day.

Q. Now, I suppose that you cannot recall specifically what Mr. Woolley may have said to you about these facts of the case during that four-day discussion?

A. No, I certainly can't.

Q. Can you recall anything at all of the subjects you discussed with him in the course of that conversation?

A. Well, I recall one thing particularly, this matter of whether or not the drivers have any control or influence over the amount of milk that might be delivered on their routes.

Q. What did Mr. Woolley say to you, as best you recall, about that?

A. Well, again——

Q. You can't recall?

A. I am reasonably sure of this, that what he said to me caused me to confirm the rough impression that I had already, that these drivers do have some control over the amount of milk.

Q. Well, what it was specifically, you said you cannot [fol. 185] recall?

A. Oh, no, I cannot recall specifically. Mr. Woolley was represented to me as a man who had been involved in this discussion over a considerable period, and I am sure I asked him questions that I thought were pertinent, and I am sure he gave me answers which he thought were responsive.

Q. Well, you understand this is not a problem of attacking the integrity of anyone.

A. Oh, I understand.

Q. But to find out what the factual bases were or the assumptions of fact that you made in arriving at these conclusions. Do you recall what Mr. Woolley may have said about the facts of the case?

A. This is impossible for me to recall. This was ten months ago or longer.

Q. Well, I do not doubt that, but I merely want to give you an opportunity at this time, if you do recall anything specifically that was said to you that we can bring it out.

A. Well, I would be delighted to bring it out, but I just do not burden my mind with that sort of thing.

Q. Now, very frequently in your answers you have said that a problem cannot be answered in a vacuum or that [fol. 186] a decision must depend upon the facts of the case. Now, I take it that you mean by that that in determining what allocations should be made or what service units should be selected, that the facts of the individual case govern rather than any abstract principles?

A. Well, yes; that is, if you get abstract enough in your principles, sure, a principle governs, namely, a principle of logic, as I pointed out, or a principle of common sense.

Q. But if there were three or four possible service units to be selected, the determination of which one would be appropriate would depend primarily upon the circumstances of the individual case, would it not?

A. All of the circumstances, yes.

Q. And it would be those circumstances which would suggest which one of the service units might have the most nearly logical connection with the expenditures?

A. I think so, yes.

Q. What I am saying is, there are no dogmatic rules that would govern the selection as opposed to the analysis of the facts of the case?

A. Our committee report, and this represents my own [fol. 187] personal conviction, did the very best we could with the English language to state this, namely, that the cloth has to be cut to fit the particular situation that you have in mind.

Q. Well, with that in mind, on Page 28 of the cost justification report from which we have read some pages before, there is one sentence that was between two passages that were quoted that I do wish to call your attention to and see if that does not express your judgment, and that is the sentence in the first full paragraph, reading:

> "In many cases more than one service unit might be chosen. The precise choice will depend on two main considerations: 1, which service unit most closely approximates a satisfactory measure of benefit or

activity in terms of rational analysis, and, 2, which service unit can most readily and economically be counted both in total and in terms of the costing segments."

Now, that is an expression which you, I take it, are in complete accord with?

A. Oh, yes, sir.

Q. Now, when we speak of a service unit that most [fol. 188] closely approximates a satisfactory measure of benefit or activity, that is to be determined by an analysis of the facts and circumstances of the particular case?

A. I think so.

Q. Now, your experience has been, has it not, that studies for Robinson-Patman Act purposes have often led to changes in management policies?

A. This has happened; this has happened, I am sure.

Q. Well, you probably have personal acquaintance with some of those instances, have you not?

A. Well, yes.

Q. Now, turning to the proposed pre-trial order as to Borden Company on Page 7, I call your attention to the language of the first sentence:

"Because of the foregoing inherent characteristics in the distribution function, each cost element or homogeneous grouping of same should be identified and analyzed separately to ascertain the various economic conditions and factors which create such costs and then be allocated to its sources."

Now, that word "should" implies a quality of being man- [fol. 189] datory, and I do not think you intended to have it be a mandatory requirement that each cost element should be analyzed, did you?

A. Well, there is a good deal of mandate involved in that sentence, that is, I do not think a cost analyst is doing his job unless he looks at all the cost elements.

Some of them he may not look at very hard. He may arrive at a snap conclusion and discard them conceivably.

Q. Well, what I am trying to say is, you do not mean to imply that it is mandatory that every cost element should enter into a cost study?

A. Oh, not necessarily. Oh, no, of course not.

Q. And it may become very apparent on looking at a cost element that it is either sufficiently indirect or remote or sufficient- insignificant in amount, or so indefinite in character, as to make the analysis not a fruitful one.

A. Well, this certainly happens, yes.

Q. Well, you did not intend in what you said in B then to say there is anything improper in leaving out in the long run of a cost analysis elements of cost?

A. Oh, no. What this sentence says is that every element [fol. 190] should be looked at. It should be regarded to see whether it should be included in the analysis or should not be included in the analysis, and an informed judgment should be made.

Q. Isn't what you are saying simply this, that every cost element should be out on the table open for inspection?

A. Absolutely no question about it.

Q. Whether or not more is done with that particular one in cost study is a matter of choice and judgment and the circumstances of the case?

A. That is right.

Q. Now, I have a reference today to an article which you wrote, entitled "Cost Justification Under the Robinson-Patman Act, Volume 1, June, 1956," at Page 52.

If you will recall that article in a way commented upon the report of your Committee.

A. Yes, I think it did. This was June of '56, and the report of the Committee was submitted in February, as I recall it.

Q. Now, I am going to read you certain passages from your article and ask if that expresses your present opinion.

A. May I inquire, do you have these passages simply [fol. 191] excerpted from there or do you have the whole article?

Q. I just have them excerpted, although I have a full text of another article which contains substantially the same material.

A. Of course, it always bothers me a little bit to have to consider any passage completely out of context.

Q. Well, appreciating that, I would be very happy to have you comment when you feel something should be added; but let me read these before your comment.

A. Also please remember that I wrote this article three years ago.

Q. June of '56, I think it was.

A. Or, I mean, two. I am sorry. Two years ago.

Q. (Reading):

"The Committee's grounds——"

This appears at Page 55, and I will quote:

> "The Committee's grounds for urging a continuance of the de minimis doctrine and similar aspects of reasonableness is the proposition that no cost analysis procedure in a complex situation can do better than arrive at approximations. The results are reliable only in the sense that they determine a range within which [fol. 192] the true cost differences may reasonably be said to lie.
>
> "They do not pinpoint cost differences with precision. Judgments based on the results of such studies must recognize their approximate character."

Now, that states a general proposition which I think is in accordance with your present opinion?

A. I surely would agree with that at the present time, yes.

Q. Now, you comment again on the same page as follows:

> "The report takes a strong stand in favor of the propriety of reasonable classification of customers, commodities, and transactions for cost justification purposes."

And a little later on in another sentence:

> "Cost justification of each individual transaction with each individual customer has not been required."

Now, again, those are comments that properly characterize the conclusions reached by you and the Committee?

A. Yes. Of course, that last one, I am sure I was talking about Federal Trade Commission actions where the Com- [fol. 193] mission has never seen fit to require a meticulous costing of each individual transaction to each individual customer.

Q. Yes; in fact, you did make a reference to the position of the Committee on that matter?

A. Yes, I am sure I did. That is what I had in mind.

Q. Now, on Page 56 of the article you discussed the reasons why the Committee did not set out specific rules for cost analysis, and you made this statement, among others:

> "Operating organizations and procedures are so diverse and the details of particular complaints are so unpredictable that no logical approach to cost justification should be ruled out simply because it is found to be non-comformable to some recognized procedure."

Now, I take it that is consistent with the position you have taken here?

A. Oh, entirely.

Q. And that expresses your present point of view as well now as it did at the time you wrote the article?

[fol. 194] A. Yes.

Q. I just mislaid a piece of paper that I had here a minute ago. Now, you wrote an article entitled "Work of the Cost Justification Committee," which appeared in the Anti-Trust Bulletin for January of 1956 also, did you not?

A. That is probably true. I think, if I remember rightly, that was a report on a speech I made here in Chicago, isn't it? I believe that was the thing.

Q. Well, this is a photostatic copy. Perhaps you recall it.

A. Yes, I think this is true, yes.

Q. Now, on Page 587 of that article you made this statement: "This matter—" Perhaps we can go back to an earlier sentence where you said:

> "We shall also not recommend continuous Robinson-Patman accounting."

And then dropping down, you said:

> "This matter, as well as some others with which the Committee has to deal, has a special aspect with which we have tried not to be unmindful. This is the fact that price-makers must make due allowance before

transactions are consummated, though the costs con-
[fol. 195] sidered in each litigated case have been those actually incurred in some past period.

"The Committee would not like to lend even negative support to the proposition that because a company has not set up a Robinson-Patman cost finding system it has not made due allowance; hence, our very positive statement that continuous Robinson-Patman cost finding is not practicable."

Now, that expresses an opinion which is in accord with your present thinking, does it not?

A. It sure does.

Q. Now, on Page 588, again referring to the report of your Committee, it is stated——

A. Note that this reference is before the report had actually come out. It was made at a time when the report was pretty well along in its preparation.

Q. Yes, that appears from the context.

A. Yes.

Q. And I am not so much interested, Professor Taggart, in exactly whether the report followed this, but whether these expressed your point of view.
[fol. 196] (Reading):

"The Committee's grounds for urging a continuance of the de minimis doctrine and similar aspects of reasonableness is the proposition that no cost analysis procedure in a complex situation can do better than arrive at approximations.

"The results are reliable only in the sense that they determine a range or area within which the true cost differences may reasonably be said to lie; they do not pinpoint cost differences with precision, hence, judgments based on the results of such studies must recognize their approximate character."

Now, that is saying about what one of the earlier passages said?

A. This is essentially what I said in the article in Journal of Accountancy. This, however, does not carry to the point of condoning sloppy procedure.

Q. Now,—but it does recognize that the basic problem each time is to ascertain the facts of the given situation as best you can?

[fol. 197] A. Yes.

Q. Now, I read to you the next paragraph, which is a little different subject:

> "The report will advocate a broad interpretation of the phrase 'Cost, of Manufacture, Sale or Delivery.' It is the Committee's position that there are few if any items of cost that may not properly be said to contribute in one way or the other to the production of goods or distribution.
>
> "In the case histories there appears a tendency to place some costs outside the pale because of the notion they are not costs of manufacture, sale or delivery.
>
> "No Commission ruling seems ever to have been based on such a contention. The Committee's hope is that none ever will."

Now, again, that agrees with the position you stated a little earlier, that all the facts should be laid on the table?

A. Well, yes, and, of course, it goes beyond that, too. I obviously had examples in my mind when I wrote that where either Commission accountants or Commission at-[fol. 198] torneys or maybe attorneys for plaintiffs in damage suits had taken the attitude certain costs ought to be excluded completely from the picture, because they were not costs of manufacturer, sale and delivery in what they assumed was the very narrow language of the statute.

The hope I expressed there was that the statute would not be so narrowly interpreted.

Q. Now, I turn your attention to Page 589 to this sentence:

> "The report will take a strong stand in favor of the propriety of reasonable classification of customers, commodities, and transactions for cost justification purposes. The Commission in all of its decisions seems to agree that classifications of customers and transactions are proper if they are reasonable in view of the purposes of the Act.

"The cost justification of each individual transaction with each individual customer has not been required."

Again, that is saying essentially what you said before and [fol. 199] expresses your present point of view?

A. That is right.

Q. Now, I call your attention to the next paragraph of the article where you are referring to some of the pitfalls of cost justification, and say:

"For example, we shall point out the advantages of using a sampling approach rather than trying to cover the universe."

Now, you still believe that the sampling approach must be stressed, is very often more effective than an attempt to make a superficial analysis of the entire area?

A. This is perfectly true, and that, of course, is exactly what I say in the later part.

Q. Yes. Specifically what you said was: "In the great majority of situations well chosen samples can save much time and money and at the same time actually give the Commission a better picture of company activities than a less intensive job on a company-wide basis."

A. That is right. That is very true, indeed.

Q. And again in this article you made the statement similar to one you have stated that I quoted before:

"Operating organizations and procedures are so [fol. 200] diverse and the details of particular complaints are so unpredictable that no logical approach to cost justification should be ruled out, whether it conforms to some recommended procedure or not."

And again, that expresses your consistent and continued opinion?

A. This I think is almost, if not identically, the same sentence as read before. These two articles were actually the same article with slight changes in view of the time and circumstances.

Q. Now, in one of the passages from the Accountants' Hand Book on Page 337 that we referred to, you did recognize that the number of delivery stops had some

influence on the time required and may affect certain cost elements.

Now, I take it that in that passage you have reference to such cost elements as consumption of gasoline, wear and tear on motors?

A. And—brakes.

Q. Brakes, and the rest of it that are particularly affected by the starting and stopping process.

A. I presume that is what I had in mind in all probability.

[fol. 201] Q. Are you aware of studies that have indicated, for example, that with respect to such an item as gasoline, that the major amount of the consumption of gasoline takes place in the process of starting the motor?

A. Well, I have never seen such studies, but I will take your word for the fact that they exist.

Q. You drive an automobile yourself?

A. Yes, I do.

Q. And you are aware of the fact, I take it, that when you start an automobile that you should not race it because initially the lubrication is not where it should be and the wear and tear on the engine at the beginning until the lubrication functions is greater than it is when a motor is running?

A. Of course, we are talking about the first start of a morning and particularly a nice, cold morning when you talk like that.

Q. Well, are you sure that isn't true every time you start a motor?

A. It depends on how long it has been standing, I should think. Now, of course, this is a layman's opinion. I am not an automobile mechanic.

Q. Well, what I am trying to say is that assuming there [fol. 202] are factors like that, that could show a direct relationship between the cost of driving trucks and the number of stops?

A. I suppose that I probably had considerations of that sort in mind when I wrote that in the Accountants' Hand Book back whenever it was I wrote it.

Q. Now, the kind of facts you have in mind have to be ascertained to determine the rational connection between a service unit and the total expense?

A. I suppose so. Frankly, I would not know just what the connection with that is.

Q. Well, you say that because what you have reference to is again that none of us can generalize on facts of which we do not have a particular personal knowledge, isn't that correct?

A. Well, it is a little unsafe to be too dogmatic in your generalizations.

Q. Well, what I have in mind is that you are not in position, I take it, Professor Taggart, any more than any other layman, to estimate what proportion of the wear and tear or maintenance expense or gasoline or oil consumption of a truck relates to the process of starting and stopping, as against the continuous driving?

A. Oh, no, of course I have no basis for judgment on [fol. 203] that point.

Q. But facts relative to that might be also relevant to the question of a rational connection of the allocation of the driving expense of the truck?

A. Oh, surely. That is, if facts of this sort were available and if the cost analyst and the company whose costs he is analyzing are willing to take the time and trouble, this might possibly affect some conclusion, they might arrive at one.

Q. Or if there were studies of that general subject that had been made that were available to the officials of the company, they could base their judgment on the basis of such technical studies made elsewhere if they were applicable?

A. Well, I am sure they do base judgments in various areas on technical studies made by other people.

I say, assuming that the study is covered, a type of transportation and type of situation with reasonable comparability there, I should think they might get some benefit out of it. This is why we have technical journals.

Q. Now, are you familiar with any of the literature relating to the study of distribution costs in the area of the dairy industry?

[fol. 204] A. Well, there was one quite a long time ago by a man by the name of Johnson, if I remember rightly, on distribution costs in the ice cream industry. Now, I assume

that the ice cream industry is a branch of the dairy industry. Is that a fair assumption?

Q. Well, the gentleman referred to is a man named O'Neil Johnson.

A. O'Neil Johnson. I was trying to remember his first name.

Q. Do you recall of your own knowledge an acquaintance on your part with any other studies in the dairy industry?

A. The Federal Trade Commission made a rather considerable study apparently of the costs of milk delivery back in, well, I do not know when. I would say it was the Thirties, perhaps '35, something like that.

Now, how considerable it was, I do not know. I have never seen the study, but I have seen references to the study and I have also seen extracts from it as published by the Federal Trade Commission in a book they got out in 1941.

Q. You yourself have not referred to any of the literature with respect to the dairy industry in formulating your [fol. 205] opinions expressed in the proposed draft of a pre-trial order in this case?

A. Not as of last June or July, when these opinions were formulated, no.

Q. You mentioned that you had some acquaintance with the University of Minnesota. You were acquainted with a study by John Elmberg and Fred Kholer, the studies by those gentlemen at the University of Minnesota?

A. No, I am not.

Q. Are you aware of, or do you have any knowledge of these various studies that have been conducted in the State of California that happened to be those under Professor B. A. Clark?

A. No. Were they for Robinson-Patman purposes, by any chance?

Q. Well, I do not recall whether they were. They were studies of milk delivery costs and volume pricing procedures in the State of California. I suppose they were for all purposes including Robinson-Patman Act purposes.

A. Could well be.

Q. You have no familiarity with those?

A. No, I have not.

[fol. 206] Q. Do you recall at this time any other literature relating to the dairy industry with which you are acquainted, which you may have had in mind at the time of the formulation of the opinions set forth in this drafting of the pre-trial order?

A. Well, I cannot recall any.

Q. Now, I want to ask you this situation. Suppose that I had a delivery truck that had five customers on a route and each one was five miles apart and you delivered varying amounts of goods to each one of those customers, what would be the service unit that you would select as most reasonable for determining the cost of that delivery service?

A. I would be inclined to select physical volume or its rough equivalent, list dollar sales.

Q. Despite the fact that the truck had to drive the same number of miles to each customer and the same usage of truck was involved in each case?

A. Yes, I think so; yes.

Q. Wouldn't it be perfectly proper to allocate that on a mileage basis in that situation?

A. I do not think so. I would not do it.

Q. Why?

[fol. 207] A. Because this does not reflect the benefit that these customers get out of the utilization of this truck, this rolling warehouse.

The benefit that they get out of it is reflected by the amount of milk that they have delivered at their premises.

Mr. Ball: May I have just one minute to look over my notes here?

(A short recess taken.)

[fol. 208] Redirect examination.

By Mr. Jinkinson:

Q. Professor Taggart, now I just have a few questions to ask you here. Do you remember the occasion of my first telephone call to you making an appointment with you?

A. I remember you called me, yes.

Q. In that telephone conversation I asked you whether or not it would be convenient for me to see you with ref-

erence to possibly employing you as an expert in this matter?

A. Yes, I am sure you asked me that.

Q. And we made an appointment to see you then at your office in Ann Arbor, Michigan, some time in early June, 1957?

A. That's right.

Q. And Mr. Woolley and I met you at your office?

A. That's right.

Q. At ten o'clock, I believe, a.m.?

A. If you say so, I presume that was the hour.

Q. And we were through by lunch, were we not?

A. I have a sort of recollection of eating a rather late lunch that day and you had gone. I think this is correct.

[fol. 209] Q. Now, at that time neither Mr. Woolley nor I brought any papers or documents with us, that you recall?

A. No, I don't think I recall any at that time, at the time of your visit. I think the documents appeared later on.

Q. We were merely, or I was, in particular, merely interrogating you with reference to the terms of your employment and outlining to you the nature of the study to be made?

A. Yes, that was what you were concerned about.

Q. And it was agreed that some time later we would send to you the documents which have been outlined in Taggart-Bowman Exhibit No. 2, is that right? They would be sent to you?

A. Well, I presume so. To be perfectly honest I had forgotten whether they were brought to me by hand or sent to me through the mail, but it is certainly conceivable that they were sent through the mail.

Q. And under the terms of your employment were you employed to make an objective study of this material and this problem which was submitted to you?

A. Why, yes, of course.

Q. You weren't requested to substantiate the views of

[fol. 210] Woolley or anyone else with the Government, were you?

A. Not at all.

Q. The material was sent to you through the mail and you studied it, had the benefit of the study of it before we talked to you or discussed the matter with you again; is that right?

A. Before we discussed any details whatever, yes.

Q. And the next occasion was after you had the material, Mr. Woolley saw you?

A. Mr. Woolley came up then for several days.

Q. And were you asked at that time, the occasion of either the first time or the occasion of Mr. Woolley's second visit, to substantiate his views, or were you asked for your opinion in this matter?

A. I was asked for my opinion.

Q. And your opinion, as reflected in the proposed plaintiff's rebuttal order, is your opinion and no one else's?

A. That's right.

Q. Now, referring to Taggart Exhibit No. 1, which is the cost justification report made by your committee, of which you were chairman. The report itself, on Page 5, sets forth the aim of the committee, does it not?

[fol. 211] A. Yes, I think so.

Q. And particularly the first—the second paragraph on that page, which says:

> "It is further stated that the work of the committee is advisory only, and its function will be to continue to make recommendations to the Federal Trade Commission."

It was not put out as a work which everyone had to follow in using, making cost justification defenses or study in this matter?

A. Obviously not.

Q. Mr. Taggart, prior to the time that your statement was included in the pretrial, the plaintiff's rebuttal proposed rebuttal pretrial order, was that material shown to you for your comment?

A. Yes; yes, of course.

Q. It was not something that was put in and then shown you afterward?

A. Oh, no, not at all.

Q. Just one further question. I believe you said yesterday and this morning also that you had not seen the labor

contracts which were in existence between the Bowman and [fol. 212] Borden Dairy and the local union, and prior to the time you reached your conclusion, and particularly with reference to Paragraph (h) of the Borden proposal.

A. Well, I can't be absolutely certain about that, Mr. Jinkinson. The contract is not listed as one of the documents that was sent to me in June. I certainly saw the contract at the time the pretrial order reached me some few weeks back, because it was one of the exhibits that accompanied that.

Now, whether I had seen the contract while Mr. Woolley was in Ann Arbor, I am not sure. It almost seems to me as if I did at that time, but——

Q. Well, let me ask you this: If you had or had not seen the labor contracts which were in existence between the Bowman-Borden Dairy and the labor union, would it have made any difference in the opinion you express in Paragraph h on Page 9 of the proposed Borden pretrial order?

A. Paragraph h?

Q. H.

A. Yes. No, I don't think it would have made any difference.

Mr. Jinkinson: I have no further questions.
[fol. 213] Mr. Long, I think, has a few questions.

Redirect examination.

By Mr. Long:

Q. I have a few questions, Mr. Taggart. You were examined at length by counsel for Borden and some by counsel for Bowman with respect to the alternative method of allocating direct and indirect costs covered there in Taggart Exhibit 1. Now, do I understand that while there may be alternative systems of distribution of costs they both might not be valid as cost defenses under the Robinson-Patman Act if the ultimate conclusions to be drawn are altered by the alternative method.

Mr. Ball: Will you read that question back to me?

(Question read.)

Mr. Ball: I must say I do not understand what counsel has in mind.

Mr. Long: Let the witness answer. Does the witness understand?

By the Witness:

A. Perhaps the witness had better give his understanding of the question before he answers it. As I understand it, you are asking me about two alternative methods, one [fol. 214] of which perhaps would produce one answer Robinson-Patmanwise, namely, that everything was fine; the other one of which would produce the opposite answer, namely, that cost justification had not been established.

Well, if you are considering methods so far different from each other as they are, then you had better look at them pretty carefully to see which one is logical and which is not before you finally choose the one that is the final answer.

By Mr. Long:

Q. One of them might be invalid under the Robinson-Patman Act?

A. It is a red flag. It is a signal that perhaps something is wrong. The kind of alternative methods that we usually were talking about in this report were alternative methods where details might differ somewhat; perhaps the degree of spread of costs among the customer classes might be a little wider, a little narrower, but where no basic difference in the final result would take place.

Q. Would you consider it wise for the cost accountant who is working on a cost justification defense to work out these two alternative systems to see whether they would [fol. 215] work out the same result?

A. Oh, oftentimes.

Mr. Ball: Pardon me. I would like to note an objection here to the form of that question, because the form of that question asks not for the opinion of this witness as an incumbent or expert on a common matter, but he asks for the problem what we should, or how one should go about to prepare a defense, which is a matter of judgment as to how one prepares a lawsuit. I don't think the witness is competent on that subject.

Mr. Long: The lawyers would have to depend on someone like him to work out the results.

By Mr. Long:

Q. Your answer, sir, now, if you would, please?
A. Well, I guess we had better have the question again.

Mr. Long: Read the question to him.

(Question read.)

Mr. Stevens: I would like to add the objection that I [fol. 216] think the question should specify why and for what purpose, or else I don't think the answer will be meaningful.

By Mr. Long:

Q. Do you understand it so you can answer it, Mr. Taggart?

A. I think I understand the question reasonably well. I do think that an accountant would be, shall we say, not necessarily wise, but smart, on the job, on the ball, if he does work out some alternative solutions, providing, of course, always, that through working out of two alternative solutions he doesn't double the cost of his cost study. I don't think any accountant ought to do that unless there is some very good reason for it.

Q. Now, in your answers to counsel's questions here about Taggart Exhibit 1, Page 6 to 11, they read several quotations there. This went again to this alternative methods of allocation.

Do I understand that you in your answers considered that these alternative methods were each completely difinitive, and that each alternative method contained all relative costs, consideration of all relative costs, and that would [fol. 217] be necessary before these alternative methods might be considered as possible, as proper cost studies, valid cost studies under the Robinson-Patman Act?

A. Well, I wouldn't think that cost methods are, properly speaking, alternative cost methods unless they include substantially the same costs in substantially the same general degree of definition and form. That is, if one cost study is a very—I don't like to use the term "sloppy"—casual,

shall we say, cost study, which results, for example, in simply getting a grand and glorious over-all cost per dollar of sales, and another method works this down function by function, cost item by cost item, and arrives at an answer. I wouldn't say those were two alternative methods at all. They are two totally different methods. The casual one may have its uses as a rough rule of thumb approach to fast judgments in certain areas, but it doesn't deserve to be bracketed wih the more meticulous method as an alternative method.

Q. Now, did I understand you also to testify on cross examination that the relative cost factors all should be factually found, taking cost and other items into consideration, in order to determine whether any of them might be [fol. 218] omitted in the final cost study?

A. This is right. They all ought to be looked at.

Q. And you can't omit anything, am I right, until you have first found what the facts are on it and then determine whether it should or should not be omitted or eliminated from the cost factors?

A. That would be my opinion.

Mr. Ball: To avoid too constant interruptions, several times Mr. Long has used the expression "making valid the cost study." I think that question is improper in form, because I don't think this witness is one called upon to decide whether a study is a valid cost defense in the sense it presents a valid defense of the Robinson-Patman Act. I think your choice of words calls for an opinion outside of the degree of the expertize—I am not going to repeat, Mr. Long. I would just like to note that.

By Mr. Long:

Q. Is there anything mechanical or fixed about the choice of system of cost, distributionwise, under the Robinson-Patman Act?

[fol. 219] A. No, not at all. All kinds of different approaches have been taken, and different approaches have been equally successful or unsuccessful.

Q. And does it depend primarily on the distribution system, the facts and circumstances with respect to the distribution of the product?

A. To a very large extent. It depends also on the amount of money that the respondent is able and willing to spend for this purpose, because no study that is worth even bringing into court is costless.

Q. Now, you were also examined about the permissibility of ignoring certain overhead allocations on the grounds that they would follow the direct cost. Now, in order for you to agree with that as an expert, would you not also have to assume that such overhead had no direct relation to any of the customers being served.

A. Yes. Of course, this term "overhead" is a badly misused term and costs which, in a very broad sense, are overhead aren't necessarily overhead in the ultimate sense of being strictly and totally indirect. That is, if you take overhead and actually break it down, that is generally called overhead, actually break it down into its component parts, very frequently you will find certain elements of that [fol. 220] overhead which have quite direct relationships to the segment, the segments, of business that you are dealing with. It is overhead, yes, in a sort of non-technical sense. It is overhead in the sense that perhaps it is incurred in New York City, whereas the operation is out in Wichita or somewhere in the factory. But, nevertheless, you may have by the process of analysis and application of logical reasoning, may have very direct relationships, which should be taken into account.

Q. I wonder if you would again for the record tell us in your opinion, there may be differences between a management cost survey and a cost study for Robinson-Patman purposes?

A. Well, a management cost study, of course, may be anything from a very brief and very incomplete examination of a very limited territory of costs up to a pretty full-blown examination of a very large area and pretty expensive. I have seen both kinds. A management cost study, of course, can and does rely on the integrity, the objectivity, the openmindedness of most of the people it deals with. Now, of course, you have to watch your step there, naturally, because some people might in furnishing [fol. 221] information give you the information that they think you ought to have or the information that they think will do you the most good, rather than the information that

actually exists; so that usually what is needed, even where you have rather complete confidence in executives and other people, what you usually do is try to test the validity of the information they give you in terms of some kind of objective test.

Now, for Robinson-Patman purposes, well, there are obvious—I think the differences are obvious, particularly to legal gentlemen such as yourselves. The costs obviously have to be proven in a legal sense to a Court, to a trial examiner, to the Federal Trade Commission. This requires, I think, a standard of objectivity, a standard of completeness, which is oftentimes lacking in a purely managerial cost study.

I have seen many examples of this. Take, oh, such a thing as the operations of a tabulating department. Here we have a battery of IBM equipment, key punches, and all the rest. They perform services for all the departments of the business involving sales, administration, finance, everything you can think of. They work on payrolls and [fol. 222] everything else. For a managerial study it is hard for me to believe that anybody would ever take the trouble to count the holes punched in a million or so key punch cards. This has been done for Robinson-Patman purposes. I don't say that it is necessary. I think maybe this was an exercise of excessive caution. Nevertheless, it was done. It is an extreme example, of course. But it is an example of the kind of thing that you will do under compulsion of the fact that you have to prove this to the satisfaction of judges, trial examiners, commissions, which perhaps you wouldn't think of doing for your own purposes; because for your own purposes oftentimes the relatively rough approximations are satisfactory.

The merchant, for instance, watches the ratio of certain expenses to sales. This is a crude measure, but nevertheless he gets a certain amount of satisfaction out of it. If he guides his conduct in accordance with the way his ratios trend, he is perhaps not doing a bad managerial job. It is a crude instrument, which certainly wouldn't be satisfactory for Robinson-Patman purposes.

Q. And a management survey might have to be changed, altered, to make a Robinson-Patman cost survey?

[fol. 223] A. Oh, there isn't any question about this. The

Robinson-Patman cost studies have sometimes had a foundation, or an ancestor, let's put it that way, in the form of managerial studies made from time to time. The management studies, for example, time study operations in a warehouse. Why? Because they want to control operations of the warehouse; they want to see to it that the warehouse is operated efficiently, effectively; they want to see to it that the employees do their jobs in the length of time allotted to them and keep the unit costs down. This kind of thing is tremendously valuable in a Robinson-Patman study. It is not a whole study at all, but it can fit into a Robinson-Patman analysis beautifully.

Q. Let me ask you now, Professor Taggart, did you in your proposed testimony here, both in rebuttal, both as to Bowman and as to Borden, you testified that both Borden and Bowman in their cost studies have omitted certain central office expenses. Is that still your understanding, that they have omitted consideration of certain central office expenses?

A. Well, they have omitted them in the sense that they have not included them in their cost computations.

[fol. 224] Q. In your opinion, they should have at least found the facts with respect to the central office expenses there and made determination whether or not they should be allocated?

Mr. Ball: Just a minute. I object to the form of the question as assuming the fact that the witness has already been informed to the contrary. These costs were set forth in the order, and the facts were given to show that consideration was given.

Mr. Long: We just disagree with you on that; that is the state of that apparently.

Mr. Ball: The fact is that they were set forth in the pretrial order.

Mr. Long: We take it that they were not set forth. They may have been identified generally, but there was not any sort of factual finding as to what their central office expenses were.

Will you read the question that was objected to?

(Question read.)

By Mr. Long:

Q. Now, what is your answer?

[fol. 225] A. Well, I think, of course, they should have found, or they should find the facts. Now, whether in fact they did or not, I don't know, but if they did it is not reflected in their study.

Redirect examination.

By Mr. Jinkinson:

Q. There is just one other question. Do you have any interest, Professor Taggart, in who wins this lawsuit?

A. Not the slightest.

Recross-examination.

By Mr. Ball:

Q. I have got a few questions in the light of that. One question that Mr. Jinkinson asked confused me as against your previous testimony.

When were you first shown this draft of this pretrial order, proposed rebuttal pretrial order?

A. Well, the whole thing just within the past, oh, well, one of them came along maybe a couple of months ago, three months ago, perhaps—I am not sure of the date; and the other came along a little later. I would say both of them reached me within the past, at a guess three months.

Q. And that text was prepared here in Chicago and sent [fol. 226] to you by mail, is that correct?

A. Well, it was obviously typed here and multigraphed or whatever they do it here, yes.

Q. Well, was there an earlier draft of that text at any time that you saw it?

A. As far as my present personal testimony is concerned, yes. Yes, I saw this, oh, substantially earlier. How much earlier I don't know.

Q. Now, you say you saw that. In what form did you see that?

A. Oh, it was—I assume in typewritten form. I don't suppose it was in anybody's handwriting.

Q. And where was that typewritten form prepared, here in Chicago?

A. I assume so, yes.

Q. And that was again submitted to you by Mr. Woolley or Mr. Jinkinson, is that correct?

A. It came to me from this office, yes.

Q. Through the mail?

A. Yes.

Q. Were there letters of transmittal with these drafts?

A. Oh, I should imagine so. I wouldn't doubt it at all. [fol. 227] Q. Now, in each of these cases the text had finally been drafted here in Chicago, is that correct?

A. Well, yes, in terms of discussion that Mr. Woolley and I had had at very considerable length and certain penciled notes that I had made for my own benefit and for his.

Mr. Ball: That's all.

Recross-examination.

By Mr. Stevens:

Q. Professor Taggart, on Page 11 of the Taggart Report is the sentence:

> "A mere showing that a method other than that used by the respondent would produce narrower cost distribution would not serve to overthrow an equally acceptable method used by the respondent."

I think there has previously been reference to that, and that does reflect your opinion?

A. Oh, yes.

Q. Now, would that reflect your opinion even if one of the methods showed compliance with the Robinson-Patman Act and the other method showed non-compliance?

Mr. Ball: Is that in addition further to the——
[fol. 228] Excuse me, John, are you finished?

Mr. Stevens: No.

Mr. Ball: I beg your pardon. I thought you had stopped.

By the Witness:

A. Well, again what the committee was thinking in terms, what I would think in terms of, when we are talking this kind of language would be two methods that aren't necessarily extremely far apart. One method, for example, using sales dollars and another method using pounds, for instance, where there is no relationship whatever between sales dollars and pounds. But where there is a reasonable approach to similarity, then merely showing—you see, what this statement says is this: Merely showing that some other method might produce a different result doesn't disqualify the method that has been used.

Q. I take it your answer to my question is——

A. Now, the emphasis there is on "mere".

Q. That's right. The mere showing that one of the methods would show non-compliance with the Act if the other method was equally acceptable and was reasonably [fol. 229] close—I think you have that qualification—would make it permissible to accept the more favorable method rather than the other one?

A. If they are both equally acceptable from this standpoint of logic, from the standpoint of a logical analysis of the facts in the case, then I would agree.

Q. Then, Professor, on Page 9 of the Taggart Report there was a reference to this sentence:

> "That in considering the applicability of the de minimis concept the primary test to be applied is the relation of the unjustified portion to the differential itself and not to the higher unit price."

And I believe you have indicated that your personal view was that the higher unit price should also be considered?

A. I would personally be inclined to consider both things. I think of this in these terms: Suppose you had a price difference, we will say, of three cents on a dollar. Now, maybe this is sufficient to create the injury to competition and so on that the Act requires. Suppose it is all justified, if I may use that term, except one cent. Well, now, one [fol. 230] cent on a dollar doesn't sound like very much. One cent on three cents, however, sounds a little bit different, so I have a feeling that perhaps what we were

trying to say here was really—and I think the language could have been a little more, a little better written; and as I said yesterday, I didn't write it—that you should look at the unjustified portion of the differential itself, as well as to the higher unit price.

Q. Now your example refreshes my recollection of having read from a document—and I don't have it with me—indicating that you would consider a one per cent of the higher unit price, that differential would be de minimis.

A. Oh, I don't think I ever wrote such a thing as that.

Q. Didn't you?

A. Oh, my, no. I wouldn't be guilty of a thing like that.

Q. That is the example you just picked, one per cent on a dollar price.

A. I also suggested in that case that one cents on three cents usually gives you cause to stop and wonder whether this really is de minimis.

[fol. 231] Q. That's right, because that is thirty-three per cent if you give that example.

A. The Federal Trade Commission in the Sylvania case, for example, where the final argument between the accountants on the two sides amounted to eighty-seven hundredths of a cent, concluded that eighty-seven hundredths of a cent—at least I assume they concluded—that eighty-seven hundredths of a cent, with about a fifty-five or fifty-six cent price to the group of customers that were supposedly being discriminated against, came to the conclusion that that was de minimis. Now that percentage relationship—I figured out just the other day, as a matter of fact, if I remember right, that the percentage was 1.56 per cent. It is a Federal Trade Commission or the Court that decides what is de minimis. I don't. I wouldn't even aspire to decide what was de minimis. I might have my own personal opinion.

Q. The examples you have just given would indicate to me that your own personal opinion is that one per cent of the higher unit price would be de minimis in your opinion?

A. Not necessarily. Again let me talk about this Sylvania case. The price difference here was not three cents; [fol. 232] the price difference was about fifteen cents. Fifteen—or it was more than fifteen cents, fifteen, sixteen cents, something like that. Now, this eighty-seven hundredths of a cent doesn't stack up too big against fifteen

cents. I am simply talking as a man on the street, for instance.

Q. Mr. Hart has some questions, too.

A. I wouldn't presume to question the Commission's right to decide that that was de minimus. They did. I think, if I am not mistaken, that is almost as far as they have ever stretched the de minimis concept, but I am not sure.

Recross-examination.

By Mr. Hart:

Q. Professor Taggart, in response to some of Mr. Long's questions you distinguished between a Robinson-Patman cost study and a management cost study. Now, do I understand that that distinction means that you are distinguishing a cost study made for Robinson-Patman purposes after a company is under investigation or under suit, or something like that, and a management study for the purpose of determining prices or discounts?

A. Well, there is a distinction there, as a matter of fact, [fol. 233] without any question. I think a management study made in anticipation of the issuance of a new discount schedule, for example, is oftentimes a—not a crude approximation, but let's say a relatively rough approximation. What management usually works for, in a situation like that, is assurance to itself that the cost differences, even though the study were carried out in tremendous detail and with fine-spun accuracy, would still stand up to be something like the amount of the price questioned.

It doesn't follow that they have to for that purpose, for that kind of preliminary purpose, it doesn't follow that they have to go through all of the expense and the time consumption which is necessary, which is forced upon them by a formal Robinson-Patman complaint.

I have participated in many of these strictly internal cost studies of this sort. They may, for example, confine their attention almost entirely to one general element of cost, maybe they do nothing with anything except salesmen's time and salesmen's expense. And if they become convinced, as a result of some study of salesmen's time and expense, that perhaps that cost alone would be enough to

[fol. 234] justify the price differences they propose. Then why should they go into the problem of counting up all of their invoice lines and the spots on their tabulating cards, worrying the executives about whether they spend five minutes with the president of A & P a week, and all this sort of thing.

Q. Would it influence your judgment of such a study if when it was begun and when a large portion of it was completed, the company involved was in a lawsuit in which they were being sued for $16,500,000?

A. Well, if you are being sued for $16,500,000 you proceed with caution, I would assume.

Q. In other words, it would be quite possible under those circumstances that the cost study that you would embark on to justify or not your discounts and situations would be somewhat detailed and somewhat cautious and the best you could certainly afford?

A. I would be inclined to make it so. You are talking to me now as if I were a company official, for example, trying to decide this question.

Q. I am asking your opinion, yes. Under those circumstances you——

A. I think I would jump the budget a little bit under [fol. 235] those circumstances and authorize the expenditure of more time and money.

Q. And your criticism of the ordinary cost study that you were discussing is when management is doing it in a more or less cursory fashion, for the purposes of just determining what their own policy should be——

A. Well, I don't recall criticizing this. I think this makes good sense. Because, after all, you have got to make a profit in business, as I understand it, and you can't make a profit if you spend all the money on accountants and industrial engineers and all the other people that have to be pulled in to a thorough-going cost study of this sort. I tell my students sometimes that accounting is a necessary evil and they ought to get used to being so regarded.

Q. You understood, I believe you testified earlier, that all of the work papers behind either specifically the Bowman study and the Borden study were available to the Government?

A. I was told this, yes.

Q. And I assume that Mr. Woolley and Mr. Jinkinson also informed you that they would be available to you if you wanted anything?

A. Why, I am sure they would have been, yes. I don't [fol. 236] know whether they gave me that specific assurance or not, but I have no doubt that if I had requested it——

Q. You came to the conclusions that are contained in your proposed testimony in the Bowman rebuttal order without any examination of any of those work papers, in fact, the examination of no documents other than these mysterious memorandums by Mr. Woolley, other than those listed on Bowman-Taggart Exhibit 2?

A. Now these are the documents that I reviewed. This is correct.

Mr. Hart: I think that's all.

Mr. Ball: What I started to say is that I would like to ask the Government if they would produce, before we close with Professor Taggart, the copies of the correspondence that passed between Professor Taggart and them in relation to the transmittal of these documents.

(Discussion held off the record.)

(Whereupon the further hearing of the deposition was continued to Wednesday, April 16, 1958, at 1:30 o'clock P.M.)

[fols. 236a-236b] Notary Public Certificate. (omitted in printing)

[fol. 236c] Stipulation as to signing depositions. (omitted in printing)

[fol. 237] TAGGART DEPOSITION EXHIBIT NO. 1

Trade Regulation Reports

Second Extra Edition

Number 44, March 26, 1956

Cost Justification Report

Cost Accounting Procedures under the Robinson-Patman Price Discrimination Act

Text of Report to the Federal Trade Commission by the Advisory Committee on Cost Justification

Also Text of Robinson-Patman Act

[fol. 238] Foreword

Here is set forth the full text of the Report made to the Federal Trade Commission by the Taggart Advisory Committee on Cost Justification, based on its two-year study. The Committee was formed by the Commission in 1953 to investigate the feasibility of developing standards of proof and procedures for cost accounting to determine compliance with the Robinson-Patman Act, which prohibits certain price discriminations not justified by differences in cost. In its Report, the Committee recommends general principles of accounting and procedure to insure and to prove compliance with the Robinson-Patman Act. The Commission has taken no action on the Report except to release it to interested persons for study and comment.

The Report will be of interest to company officials who help to establish price policies for their companies, to accountants who are responsible for accounting procedures of companies subject to the Robinson-Patman Act, and to attorneys who are interested in insuring or proving compliance with the Act.

For the convenience of reference, the text of the Act is reproduced. Court decisions and Federal Trade Commission rulings interpreting and applying the Robinson-Patman Act are covered in CCH Trade Regulation Reports.

Commerce Clearing House, Inc.

Trade Regulation Reports, published biweekly by Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago 30, Illinois. Subscription rate $110 per year. Entered as Second Class Matter, November 22, 1948, at the Post Office at Chicago, Illinois, under the Act of March 3, 1879. Tenth Edition, No. 44, Second Extra Edition, March 26, 1956. Printed in U. S. A. All rights reserved.

[fol. 239] Table of Contents

Cost Justification Report

	Page
I. Purpose and Scope of Report	5
II. Basic Interpretations of Cost Proviso	6
A. The cost proviso	6
B. The meaning of "differentials" in price	6
1. In general	6
2. Delivered prices	7
3. Discounts, allowances and rebates	7
4. Cash discounts	8
5. Aggregate and average prices	8
6. Basic price comparisons	8
C. The meaning of "due allowance"	9
D. The meaning of "resulting from . . ."	9
E. Delivery cost differences	9
III. Accounting Proof and Procedures	10
A. Basic concepts	10
1. The nature of cost accounting	10
2. A broad approach desirable	10
B. General principles of proof	10
1. Anticipated costs	10
2. "Good faith" cost studies	11
3. Areas of cost	11
4. Incurred costs	11
5. Source of cost data	11
6. Extent of cost surveys	11
7. Classification of customers, orders, commodities and transactions	11
8. Sampling	12
9. Substitution for time studies	13
10. Incremental costs	13
11. Cost variations	13
C. Methods and procedures of cost analysis	13
1. General considerations	13
2. "Robinson-Patman Act" accounting	14
3. Methods of cost analysis	14
(a) General principles	14
(b) Costs of "manufacture, sale or delivery"	15

C. Methods and procedures of cost analysis—continued

Page

(c) Specific cost differences 15
(d) Direct and indirect costs 15
(e) Methods of determining amount of direct cost 16
(f) Methods of determining amount of indirect cost 16
(g) Method of determining most applicable methods of determination of direct cost or of apportionment of indirect cost 16

[fol. 240]

4. Special problems of cost analysis 17
(a) Direct costs varying with sales price 17
(b) Salesmen's "missionary" expense 17
(c) Zone costing 18
(d) Multiple-plant costing 18
(e) Recommendation 18
IV. Federal Trade Commission Procedures and Organization 18
A. General 18
B. Consultation facilities 19
C. Accounting Adviser to the Commission 19
D. Pre-trial techniques 20
E. Expert testimony 20
1. The role of the expert witness 20
2. Written opinions 21
F. Continuing accounting opinions 22
V. Conclusion 22
Appendix A—Illustrative Methods and Procedures for Allocating Manufacturing and Distribution Costs 23
I. Costs of Manufacture 23
A. In general 23
B. Determination of manufacturing cost differences 23

II. Distribution Costs 24
A. In general 24
B. Functional method of distribution cost analysis 25
C. Principles of functional costing 27

Law Text

Robinson-Patman Price Discrimination Act 29

Index

Topical Index 32

[fol. 241] Cost Justification Report

A Report to the Federal Trade Commission by the Advisory Committee on Cost Justification Under the Robinson-Patman Price Discrimination Act

I. Purpose and Scope of Report

The formation of the Advisory Committee on Cost Justification was announced on November 30, 1953. In an accompanying statement the objectives of the Committee were outlined as follows:

> "The Advisory Committee will ascertain whether it is feasible for the Federal Trade Commission to develop standards of proof and procedures for costing which can be adopted by the Commission as guides to business enterprises. To the extent that such standards of proof and reliable guides to satisfactory costing procedures are susceptible of development, sellers who wish to facilitate a determination of compliance with the Robinson-Patman Act would be able to organize their cost records accordingly."

It was further stated that "the work of the Committee is advisory only, and its functions will be confined to making recommendations to the Federal Trade Commission."

While in the area of accounting, dealing as it does with widely diverse situations, it is impractical to express highly definitive standards of proof, much can be gained from a statement of principles which the Committee believes would help toward the achievement of the objectives envisioned at the time of its appointment. Accordingly, the Committee has invited the views of other interested persons, groups and organizations. It has reviewed and carefully considered the history of the administration of the cost proviso of the Robinson-Patman Act by the Federal Trade Commission and the courts. In addition, Committee members have prepared detailed analyses of specific phases of the subject matter.

This report is a summary of the material which the Committee has developed. While the Committee has endeavored to reflect the cost proviso as it has been interpreted by

the decisions of the Commission and the courts, it is recognized that these official interpretations have been few in number and related to a limited number of specific situations. It is not possible to say, therefore, that every recommendation of the Committee reflects such official determinations in their entirety under all circumstances. The Committee has tried, however, to avoid an expression of principles which are in conflict with either the intent of the Congress or subsequent administrative and judicial interpretations. It hopes that its expressions of accounting principles may point the way toward the achievement of the purposes for which the law was enacted and assist the Commission in arriving at its goal of voluntary compliance.

As part of the over-all problem of cost justification under the Robinson-Patman Act, the Committee has also carefully considered and recommended interpretations of key words and phrases in the cost proviso in the light of [fol. 242] accounting and economic realities, as set forth in Section II of the report.

Section III is concerned with general principles of accounting proof and methods and procedures of cost analysis. This Section discusses basic concepts essential to an understanding of the nature and limitations of cost accounting and the necessity for a broad approach in the administration of the cost proviso; acceptable general principles of accounting proof; and acceptable techniques for ascertaining cost of differences, including special problems of cost analysis under the Act.

The Committee is of the opinion that the Commission's administration of the Robinson-Patman Act would be facilitated by certain organizational and procedural changes relating to cost justification. Our recommendations in this area, set forth in Section IV, relate to the adoption of consultation facilities; the continuing issuance of accounting opinions; the appointment and functions of an Accounting Adviser at the Commission level; the use of pre-trial techniques in formal litigation; and the role of the expert witness and the preference for written expert opinions over expert oral testimony only.

A concluding statement appears in Section V, and an

appendix covering details of cost analysis procedure is attached.

While each member of the Committee has signed the report as an individual, the report is a group product, and the signatures mean only that the members agree to the substance and general intent, and not necessarily to the precise language of the report, which may conceivably be interpreted with different shades of meaning.

II. Basic Interpretations of Cost Proviso

A. The cost proviso

The Robinson-Patman Act, approved June 19, 1936, amended Section 2 of the original Clayton Act. The provision of the Act with which we are concerned is the cost proviso in Section 2(a) which permits a seller charged with illegal price discrimination under that Section to defend such a charge on the ground that his differentials in price "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

It is essential to the cost analyst that he have an understanding of the requirements of the statute. For this reason, we shall present our interpretation of key words and phrases of the cost proviso in the light of accounting and economic realities.

B. The meaning of "differentials" in price

1. In general. One of the first tasks confronting the cost analyst is to determine the price differentials to be cost-justified. The records of Robinson-Patman Act administration contain many examples of disputes as to what constitutes "price" and how "price differentials" are to be measured. In general, the price of a service or com- [Fol. 243] modity is measured by the value of the consideration which passes from buyer to seller in the exchange: it is the amount which the buyer agrees to pay and the seller agrees to take.

2. Delivered prices. In all instances of "geographic" or "delivered" pricing the intent of the parties must be con-

sidered—what they mean the price to be. If the arrangement is for the buyer to transport the goods, or pay for the transport, the price obviously does not include freight charges (e.g. $1 per dozen f. o. b. seller's factory, no freight allowed). On the other hand, if it is understood that the seller will transport the goods to the buyer or pay for transport, price includes transport (e.g. $1 per dozen f. o. b. buyer's plant, or $1 per dozen f. o. b. seller's plant, full carload freight allowed). In each case (whether transportation is prepaid or allowed) the price is $1 per dozen, i.e., there is no price differential. In finding price it is reality that counts, not form; it is, for example, of no consequence that in one case the seller pays the freight and in another the buyer pays it and deducts the amount on payment of the invoice; either way freight is seller's cost. However, if a seller charges one buyer $1 per dozen and delivers the goods to him, and charges another buyer who picks them up at the seller's plant 90 cents a dozen, there is a price differential of 10 cents a dozen, which the difference in transportation charges may or may not fully justify.

In practice, there are many price arrangements intermediate between these two extremes. In these the seller agrees to "absorb" greater or smaller proportions of transport cost. Under such circumstances, the price is the amount which the buyer agrees to pay to the seller for goods, including as "goods" whatever transportation the seller may furnish. If competing buyers pay different prices (as here defined) for like goods the resulting price differentials must be justified by cost differences, or otherwise defended.

In zone pricing systems, prices are established according to geographic areas (the sellers, in effect, averaging transportation costs within zones). Zone pricing may result in different prices to competing buyers located in different zones which must be defended. Zone pricing, by its nature, involves a grouping of customers for pricing purposes. The problems of customer grouping are dealt with in Section III, B, 7.

3. Discounts, allowances and rebates. The price, in any instance, is net of all applicable allowances, discounts, and rebates which the buyer receives or is entitled to receive in

view of the quantities and methods of his purchases. Thus, if a buyer is billed and pays $10 at the date of sale, but is later given a rebate of $1 upon the performance of some specified act or the attainment of a specified volume of purchases, the price is $9.

If an allowance is not readily translatable into a percentage of sales dollars or into dollars and cents per unit of product, it may be treated as a cost rather than as a sales deduction. The distinction between a cost and a sales deduction may be difficult to make. However, such a distinction is likely to be academic since it will have no effect on the final result.

Discounts are called by various names according to their characteristics or the circumstances under which they are given, such as trade, functional, volume, quantity, cash, and many other types of discounts. Sometimes customers are [fol. 244] billed net and the discount does not show on the invoice; in other cases the billing is gross, with the discount computed and deducted; and in still others it is merely shown in the terms, so that the buyer can do his own computing and deducting. In any case, the price is the net amount—that is, the amount which the seller stands ready to take and which the buyer must pay.

Indirect price concessions, such as varying terms of sale and allowances for so-called "services" rendered by a buyer, also should be considered in determining net price.

4. Cash discounts. Whether or not the buyer pays his bills in time to receive a cash discount does not in any way affect the price. Where a careless or ill-financed buyer fails to take a cash discount, the excess is a payment for credit accommodation, and not a payment for goods. Thus, if the invoice price to buyer A is $10, and to buyer B is $9, and each is entitled to a two per cent discount for cash payment within a specified period, the effective price to A is $9.80 and to B is $8.82. The price differential to be justified is 98 cents, no matter whether either A or B takes advantage of the discount. Similarly, if the invoice price to both A and B is $10, A's invoice being subject to a two percent cash discount and B's price being net, the price differential in favor of A is 20 cents, whether or not A takes the discount.

5. Aggregate and average prices. The prices to be com-

pared in Robinson-Patman Act cases may be those of individual commodities, or of a group or "set," where different items are normally bought and sold as a "set," or a weighted average of the prices of a line of related products. Where differentials consist of percentage discounts or rebates uniform for all commodities, comparisons of "set" pricing or line pricing yield the same results, percentage-wise, as comparisons of the prices of individual commodities. Where price differentials on the different members of a "set" or line are not uniform percentage-wise, a weighted average produces results which may permit offsets of the individual item differentials.

The seller attempting to justify aggregate or average price differentials bears the added burden of establishing the reasonableness of that method of comparison. Among the criteria to be considered in such cases are the range of unit prices, the degree of similarity of use, the extent to which different customer classes do in fact purchase the items in the "set" or line in similar proportions, and the competitive significance, if any, of the lack of uniformity in the price spread on individual items.

6. Basic price comparisons. A special problem of price definition presents itself when two or more customers or customer classes are sold goods which differ in minor ways but which are nevertheless in essential respects "commodities of like grade and quality," the sales of which have the necessary relation to competition. Thus goods may be sold in individual packages to one customer and in bulk to another. Or, an item may be painted for one customer but not for another. If the addition to price for the added operation or material is specified in the sales contract or on the invoice, no problem arises—the prices to be compared are the stated prices of the basic commodity. If, however, prices to the two or more customers or customer classes are all-inclusive, without specification of the price of the basic commodity, it becomes necessary for price comparison purposes to compute a basic price. A [fol. 245] satisfactory approach to this problem is to compare the factory costs, either actual or standard, and to make the assumption that the same rate of gross margin applies to each dollar of cost, whether for the basic commodity or the added processing or packaging. By follow-

ing this principle prices to each customer for the basic commodity may be derived, and the price difference to be cost-justified will be the difference between these basic prices.

C. The meaning of "due allowance"

At the heart of the cost proviso is the phrase "due allowance." Believing that it was the legislative intent to permit sellers to pass on to customers the benefit of economies in manufacturing and distribution, the Committee feels that the correct interpretation of this phrase is of prime importance.

In view of the plus-or-minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), "due allowance" should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly, so as to require only "reasonable allowance" for cost differences based on sound accounting and pricing principles. For this reason the Committee approves the position taken by the Commission in applying a "de minimis" concept to cases where price differentials are not shown to be completely cost-justified but where circumstances minimize such failure to the extent that no corrective action is deemed necessary. In considering the applicability of the "de minimis" concept, a primary test to be applied is the relation of the unjustified portion to the differential itself, not to the higher unit price.

D. The meaning of "resulting from . . ."

The cost proviso permits price differentials based on manufacturing, selling, or delivery cost differences "resulting from the differing methods or quantities" in which goods are sold or delivered to different customers.

We think the legislative history of the Act clearly indicates that Congress intended the cost proviso to be interpreted broadly. As stated by Congressman Utterback, after citing examples of "differing methods or quantities" giving rise to cost differences under the proviso, such examples were "illustrative of the way in which the bill permits the translation of differences in cost into price differentials as between the customers concerned, *no matter*

where those differences arise." (Cong. Rec., June 15, 1936, p. 9415) (Italics supplied.)

There are many "differing methods or quantities" which may give rise to cost differences between customers or classes of customers. Such "differing methods or quantities" are generally ascertainable upon analysis of a seller's manufacturing and distribution system. Such analysis should interpret these terms in their broadest connotation, giving full effect to all items of cost difference. The term "resulting from" also should be given the same broad interpretation.

E. Delivery cost differences

The broad construction given the cost proviso by Congress is evident from the fact that Congressman Utterback interpreted it to include differences in delivery costs even [fol. 246] though no differences in method exist. As stated by him in explanation of the cost proviso, "Where the methods of delivery are the same, but the distance is different, price differences in such cases may of course be made to reflect those differences." This interpretation would apply with equal effect where no differences in quantities exist. Accordingly, we believe that price differentials may properly reflect differing costs of delivery of like items in the same quantity by the same method to different customers or groups of customers.

III. Accounting Proof and Procedures

A. Basic concepts

1. The nature of cost accounting. Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the prescription of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is

not warranted. With few exceptions, every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation. Standards of proof adopted by the Commission must take this fact into account.

2. A broad approach desirable. The Committee urges the adoption by the Commission of a broad approach in the evaluation of cost studies as indispensable to the equitable solution of questions which arise under the cost proviso. The adoption of such an approach is necessitated both because cost accounting entails judgment and opinion, and because of the inordinate cost of making the refinements of cost analysis which a more rigid approach would require.

B. General principles of proof

The Committee urges the Commission to endorse the following general principles concerning proof of an accounting nature to serve as guides in the preparation and consideration of cost-justification studies.

1. Anticipated costs. To the extent that costs are fundamental to determination of prices and sales policies, it is industrial practice to base decisions on anticipated costs. This requires assumptions as to basic operating conditions, e.g., rate of production, product mix, specifications, etc. When a seller is challenged under the Robinson-Patman Act to justify a price differential, the costs to be considered are historical, i.e., actual or retrospective, costs. This should not mean, however, that the studies of anticipated costs are of no value, provided the seller can show that actual costs which vary therefrom resulted from changes [fol. 247] in operating conditions beyond the control of the seller and not reasonably to be anticipated. The same conditions apply to any cost study made prior to the period under challenge.

2. "Good faith" cost studies. Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. "Great weight" should be interpreted as meaning that accounting princi-

ples relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not sound. A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent.

3. Areas of cost. Areas of cost demonstrably not pertinent to the issues should be excluded from consideration for cost-justification purposes.

4. Incurred costs. Robinson-Patman Act studies should be based on costs actually incurred; they should not be confined to costs as recorded. Many companies do not accrue all expenses during short periods. Recognition of transactions may be postponed until a convenient time; or costs capitalizable at the time of expenditure may be charged to operating expenses for convenience or for other reasons. The company making the cost analysis should rectify such departures from precise timing of expense recognition and, conversely, the Commission should insist upon such rectification where the result would be appreciably changed.

5. Source of cost data. It should be recognized that data required to prove cost justification cannot ordinarily be gathered solely from the books of account. Admissibility of pertinent cost information should not be prejudiced because it comes from sources not under continuous accounting control, such as special time studies, market surveys, and estimates and opinions of qualified experts in production and marketing functions.

6. Extent of cost surveys. The preparation of unnecessarily exhaustive, time-consuming, and expensive cost surveys should be avoided.

7. Classification of customers, orders, commodities and transactions. Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer. This is important for cost-justification purposes, since if no transaction or customer could be

treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers.

At the same time, the privilege of classification is not a license to disregard sound business and accounting concepts. In order to become the basis for cost justification of price differentials, the classification should be logical [fol. 248] and should reflect actual differences in the manner or cost of dealing. Great care should be taken in establishing price classes to make sure that all members of the class are enough alike to make the averaging of their costs a sound procedure. Customer groupings may properly be based not only on quantities sold but also according to the way customers place their orders: whether for immediate delivery or later shipment on a fixed schedule; in large or small orders; placed directly at the factory or through a sales branch; for on-peak or off-peak manufacture, etc. These trade factors may all be reflected in cost and as criteria for customer classification.

8. Sampling. The use of sampling techniques is universal in statistics, business management and accounting. It is essential if the cost of cost analysis is to be kept within reason. Sampling is used in almost every phase of cost analysis. Shorter periods of time are used to represent longer periods; a few salesmen, warehousemen, or clerks are taken as representative of all; two or three sales offices or territories may be representative of a company's entire operations; and intensive study of the handling of a few orders may suffice to give a picture of the handling of all. No opportunity to make use of valid sampling techniques should be overlooked.

The basic requirement for valid sampling is that the sample be truly representative of the whole. Such sampling is given greater probative force if it is repeated from time to time with appropriate variations which will demonstrate its representative character. The type of sampling most likely to be used in Robinson-Patman Act cost studies is the so-called "judgmental" sampling, in which the data are carefully selected for their known representative char-

acter. The competence of the judgment must be established. The random, or statistical, sample should be used where feasible, however, because of its demonstrable lack of bias.

Where time studies are necessary because operations are not uniform, it is adequate to make them on a sampling basis. It is not usually necessary to obtain time reports or to make stop-watch studies over a lengthy period or of all persons involved in an operation. A representative period may be allowed to stand for a longer period, such as a week for a month, or a month for a year. The work of representative members of a group may be timed and the result allowed to stand for the entire group.

Where a complaint covers a period of several years a cost-justification study based upon a full accounting period (quarterly, semi-annual or annual), when accurate inventory adjustments and other "closing" data are readily available, should be acceptable as fairly representative of the entire period of the complaint in the absence of affirmative evidence of a substantial nature to the effect that earlier or later conditions were at variance with the period under study to an extent which would appreciably alter the results. Whatever time period is used in any cost study should be truly representative and free as far as possible from seasonal, cyclical, or accidental variances in volume of business, characteristics of sales transactions, or incidence of expenses.

The use of sampling is one of the many areas in which cooperation between personnel of the company making the study and the Commission accounting staff may be sought. Wherever sampling is contemplated in a study which the Federal Trade Commission accounting staff will ultimately [fol. 249] have to review, advance agreement on the validity and scope of the sample may be desirable. (See Section IV, B.)

9. Substitution for time studies. The element of time is of almost universal importance where human effort is involved. However, for cost-justification purposes, time does not always have to be actually measured. Instead, logical inferences concerning time may often be accepted in measuring cost. For example, under typical circumstances, it may be assumed that it takes a uniform amount of time to

prepare each invoice line, regardless of the article sold or the quantity of articles represented. Under such conditions, the invoice line becomes a valid unit of measure of human effort.

10. Incremental costs. Cost justification is sometimes claimed solely on the basis of a difference in cost in the seller's entire business with and without the purchases of a particular customer. Such showing should not be considered an appropriate cost-justification device. All customers are entitled to share in the benefits of such a reduction in unit costs, since all customers taking goods from a common source are logically responsible for the effect of volume on unit costs.

11. Cost variations. The costs applicable to cost justification are those which vary either directly or indirectly with the factor upon which the price differential is based. The measure of cost justification is the amount of the variance per unit of product. Costs should not be excluded from the cost-justification process merely because they are indirect or difficult to allocate.

C. Methods and procedures of cost analysis

1. General considerations. As stated before, the Robinson-Patman Act permits price differentials which "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which . . . commodities are . . . sold or delivered." Thus the measurement of cost differences becomes a key problem in connection with efforts to comply with the Act and in cases where noncompliance is alleged. The Act does not define the term "cost" or any of its modifiers. The determination of cost differences is therefore left entirely to administrative procedure, guided by accepted rules of cost accounting.

The infinite variations of internal organization, methods of doing business, availability of accounting and statistical data, and other important factors, preclude the possibility of developing uniform methods and procedures of cost accounting for Robinson-Patman Act purposes. It must be assumed that cost-justification studies will be entrusted to persons who have the intelligence, experience, and imagination to adapt sound accounting principles as

found in standard works on the subject and in the practices of business enterprises to the requirements of a particular problem.

The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to strait-jacket cost justification would be self-defeating. For this reason, it is the earnest hope of the Committee that the Federal Trade Commission, while approving or disapproving particular approaches in individual instances, will refrain as far as possible from adopting specific rules of accounting analysis exclusive of others and that it will encourage the application of ingenuity and [fol. 250] imagination in this complex area. Similarly, whatever this report may say in favor of particular methods should not be construed to exclude the use of other methods which, in the particular circumstances, may give more accurate results.

Although believing that the adoption of uniform accounting methods and procedures of universal applicability would be impracticable, the Committee recognizes the necessity for exploration and development concerning the techniques of cost analysis under the Act. Consideration, therefore, has been given to certain important aspects of this problem, namely, (a) record-keeping for Robinson-Patman Act purposes; (b) general principles of manufacturing and distribution cost allocation; and (c) special problems of cost analysis, as set forth below.

2. "Robinson-Patman Act" accounting. It has not been customary for business enterprises to calculate and record the costs of commodities and distribution services in the detail required for a Robinson-Patman Act determination. An approximate knowledge of costs by products and by customers may well be of value for management purposes, but the requirements of good management do not demand the extent of detail, or continuity of records, needed for an instantaneous solution of the problems presented under the Act.

The need for special studies in the event of a Commission investigation or complaint cannot be eliminated. There is, however, no basic incompatibility between accounting classifications and procedures which facilitate answers to price discrimination questions and those required for other

purposes. A well-designed system of expense classification suitable for cost control, and the routine recording of expense data and statistical information, can provide both adequate information for making operating decisions and the raw material for special cost studies on the occasion of considering alterations in pricing policy, the pricing of new lines, or pricing for new territories or customer classes. Also, in case pricing policies are questioned by the Federal Trade Commission, such a system furnishes the best foundation for an answer to the question as to whether cost differences justify price differentials. The required studies can be made much less painful and expensive by taking action in advance to have the records contain information that can readily be assembled when needed.

3. Methods of cost analysis. *(a) General principles.* Any inquiry into methods and procedures of cost analysis for Robinson-Patman Act purposes must be concerned with two distinct problems: first, what can be done within the normal scope of commercially feasible and economically justifiable cost accounting to provide current indications of the trends of cost differences and to facilitate day-to-day consideration of over-all price policies; second, what additional steps must be taken to provide a complete picture of cost difference among customer classes or between individual customers should occasion arise? No sharp line can be drawn between these two areas of inquiry. What is quite natural and feasible for one company may be entirely impracticable for another because of differences in internal organization, degree of integration, variety of products, complexity of trade channels, methods of sale and delivery, range of size and functional status of customers, competitive practices, and many other features of business operations. Each selling organization must determine for itself how far it can or must go toward pro- [fol. 251] viding current data and how much must be left for special and occasional studies.

(b) Costs of "manufacture, sale, or delivery". These broad categories comprehend almost the entire range of industrial and commercial operating costs, since few costs are not in one sense or another expended for the production of goods and services or their distribution. Section 2(a) contains, however, one important limitation on the type of

cost differences which may be relied on; namely, they must be those "resulting from differing methods or quantities" in which goods are sold or delivered. Cost differences, to be significant, therefore, must be related to "differing methods or quantities."

The distinctions between the three types of cost; namely, (1) manufacture, (2) sale, and (3) delivery are not sharp, uniform, or important. What are called manufacturing costs in one situation are classified as distribution costs in another. Final manufacturing processes, such as packaging, are sometimes carried on under the supervision of distribution personnel and may therefore be classified among selling costs. While it is convenient, therefore, to discuss cost of manufacture and costs of sale and delivery separately, the distinction is not controlling.

(c) Specific cost differences. It is well to note that in some circumstances a very simple cost analysis is the best one. If the price differential is based entirely on some characteristic of the transaction whose cost can be directly measured, attention may be directed at that item of cost and at no other. An obvious example is the distinction between carload and less-than-carload freight. If a seller's regular delivered price is based on the expectation that he will normally ship in full carloads and pay freight accordingly, and if his less-than-carload price reflects the freight differential only, attention may be concentrated on the freight factor, without regard to other manufacturing, selling, or delivery costs. Another example would be the case of advertised and unadvertised products, if the price differential does not exceed the unit advertising cost. In many cases, however, price differentials are related to a complex of circumstances and their cost justification requires consideration of many, if not all, of the costs involved.

(d) Direct and indirect costs. Costs separately incurred for any given product, customer, or group of customers are readily assigned. These are direct costs. On the other hand, indirect costs, which are jointly incurred for two or more products, customers, or groups of customers must be allocated before total costs for any given category can be ascertained.

The importance of sound methods and procedures for

assigning all costs is apparent. Although, for reasons stated heretofore, standardization is impracticable, the Committee believes a discussion of the problems involved, and some acceptable solutions thereof, may be beneficial. Basic principles, adaptable to all circumstances, are discussed in paragraphs (e), (f), and (g) below. For a more detailed discussion we attach Appendix A entitled, "Illustrative Methods and Procedures for Allocating Manufacturing and Distribution Costs." These illustrations are suggestions only, and are not intended to foreclose the use of entirely different approaches where suitable. In all cases, it is essential that the specific conditions and factors involved in the manufacturing and distribution process be [fol. 252] fully developed before selecting methods of cost analysis.

(e) Methods of determining amount of direct cost. The amount of direct cost variation per unit of product may be determined by the most applicable of the following methods:

(1) Count. To enumerate by mechanical or other means the number of units required for a given unit of product. This includes such devices as magnetic and electric eye counters, time clocks and such procedures as numbering each unit or physically counting the number of units passing a given point. This also includes such methods of counting as time studies, time analyses and time cards where the unit of work is counted and recorded.

(2) Measure. To gauge the dimensions, quantity or volume of units used.

(3) Weigh. To ascertain by balance or scale the quantity or weight of units used.

(4) Compute. To ascertain by calculation or mathematical relationship the units used; e.g., as numbers of parts and assemblies; as quantities available for use, used and remaining.

(f) Methods of determining amount of indirect cost. The amount of indirect cost variation per unit of product may

be determined by the most applicable of the following methods:

(1) Statistical Analysis. Analysis of past performance to develop apportionment basis.

(2) Sampling. Statistical technique of testing current performance to develop basis for apportionment.

(3) Standard Allowance for Related Items. Mutual dependence of cost items used as apportionment basis; e.g., apportioning cost of heat treating on the basis of standard allowance for weight of material in product.

(4) Compute. To ascertain by calculation or mathematical relationship the units used.

(g) Method of determining most applicable methods of determination of direct cost or of apportionment of indirect cost. The most applicable methods of determination of direct costs or of allocation of indirect costs should be in the order listed as follows:

(1) That method historically used by the company concerned, the result of which has periodically and routinely been evaluated and found reasonably accurate.

(2) That method historically used by the company concerned the result of which has been sporadically evaluated and found reasonably accurate.

(3) That method which theoretically appears to be the most logical and reasonable, or that which most closely approximates a satisfactory measure of benefit or activity in terms of rational analysis and can reasonably and practicably be used.

[fol. 253] 4. Special problems of cost analysis. In addition to the general principles of cost analysis discussed herein, consideration has also been given to special problems which may arise. The Committee is of the opinion that such problems can be resolved only in the light of the specific conditions and factors surrounding the particular expenses to be allocated. A method which may be sound under certain circumstances may be unsound under different conditions. Consequently, it would not only be impracticable, but wholly inadvisable, to recommend uniform

methods of allocation. However, following are some of the special problems, together with comments thereon.

(a) Direct costs varying with sales price. Direct costs which vary with sales price include such items as sales commissions, excise taxes, and royalties computed on selling price. The problem presented is whether cost differences derived from such items are acceptable under the Robinson-Patman Act. For example, a 10 per cent cost applied to a selling price of $1 per unit amounts to 10 cents per unit whereas the same cost percentage applied to a selling price of 50 cents amounts to only five cents per unit, with a resultant cost difference of five cents per unit. There is nothing inherently unacceptable in such cost differences. However, there may be exceptions. If, for example, the differing sales commission costs per unit could be shown not to be a proper reflection of the time and effort expended in selling to different customers and classes of customers, such cost differences would not be acceptable, and a more precise method of allocating sales commissions should be utilized.

It should be noted also that such cost differences become invalid for cost-justification purposes to the extent that price differences are not based on other provable cost differences. To hold otherwise would be to recognize a cost difference based solely on unjustified price differentials. To do so would be to recognize cost differences resulting from discriminatory prices and not from differing methods or quantities of sale or delivery. On the other hand, if the price differences in question are otherwise justified by other allowable cost differences, the differences in the direct costs under discussion may also be said to result from the differing methods or quantities of sale or delivery.

This discussion of direct costs the amount of which is dependent on sales prices does not apply to the use of sales dollars as an allocation factor in the allocation of indirect costs.

(b) Salesmen's "missionary" expense. In some industries it is a common practice for salesmen to contact those who do not purchase directly from the sellers whom the salesmen represent but who do buy from their customers, such as retailers who buy from wholesalers but not from

manufacturers. It then becomes necessary properly to allocate such "missionary" costs.

The treatment of these costs is essentially a problem of ascertaining fully the facts concerning the salesmen's activities. Upon analysis, such costs may be classified as those of promotional activity or of selling activity, or they may be segregated as between these two types of activities. Thereafter, the salesmen's compensation and expenses may be allocated to the proper customer classes in accordance with the nature of their duties.

The Federal Trade Commission has held under certain circumstances that "indirect" purchasers are "purchasers" within the meaning of the Act, and this factor must [fol. 254] also be considered in allocating salesmen's "missionary" costs when incurred in such a factual setting.

(c) Zone costing. The determination of cost differences between or within zones is basically a problem in classifying customers for costing purposes in accordance with sound principles of classification, as discussed elsewhere herein. Great care should be taken in grouping customers between or within geographical areas, or zones, to make the averaging of costs for such groups meaningful for Robinson-Patman Act purposes. Such groupings should be logical and should reflect actual differences in the manner or cost of dealing with each customer group.

(d) Multiple-plant costing. A single manufacturer may have several plants producing goods of like grade and quality located in various geographical areas. It becomes important for such a seller undertaking a cost-justification study to make certain basic decisions before proceeding with the study. Such decisions will primarily be concerned with whether costing should be based on the operations of a single plant or on the costs of two or more of them.

Once again, it is essential that careful analysis be made before proceeding with the study. Among pertinent considerations are the local or national scope of the price differentials; the competitive area likely to be affected by such price differentials; the variations of manufacturing and distribution costs between plants; the conditions under which buyers are supplied from the seller's various plants, and so forth. It is only in the light of such a factual analysis that a multiple-plant seller can proceed to a

proper determination of cost differences under the Robinson-Patman Act.

(e) Recommendation. The foregoing problems are typical of many which are peculiar to cost justification under the Robinson-Patman Act, for which there is a continuing need for developing sound methods and procedures of allocation. The Committee is of the opinion that the Commission can perform a laudable service by issuing a continuing series of accounting opinions on such matters. Such opinions would greatly facilitate compliance with, and administration of, the Act. (See also Section IV, F.)

IV. Federal Trade Commission Procedures and Organization

A. General

In addition to the recommendations proposed with respect to interpretations of the cost proviso and standards of accounting proof and procedures, the Committee is of the opinion that certain organizational and procedural changes by the Commission would facilitate and implement its administration of the cost proviso. We believe that such administrative changes will encourage voluntary compliance with the Act; will materially expedite formal hearings involving cost justification; and will provide ample opportunity in adversary proceedings for opposing counsel, the Hearing Examiner, and the Commission to develop and evaluate expert testimony concerning cost justification.

[fol. 255] B. Consultation facilities

There have been occasions in the past when the Commission's accounting staff has not been adequately available for consultation in connection with the preparation of cost analyses for Robinson-Patman Act purposes. We recognize that limitations on the time and energy of the Commission's accounting staff preclude extensive consultation of this sort. It is believed, however, that in the long run the time of the staff will be conserved by making its members available to respondents and other sellers at the initial stages of preparing a cost defense. Such contacts would, of course, be optional with respondents or other sellers.

Among matters which could profitably be discussed at such conferences would be the general plan and scope of projected cost studies; the propriety of proposed sampling techniques, and the suitability of certain measures of cost in the case of the more important elements. Discussion of such matters need not in any way commit the Commission, but it would be most helpful to respondents or other sellers in determining whether or not a cost defense could be successful; how long its preparation would take; and whether the expenditure involved would be justified. It would also forestall going down blind alleys and making costly and time-consuming mistakes.

The Commission's accounting staff might also be available for consultation on a strictly limited basis during preparation of cost studies in case major points of doubt or difficulty arose. Since the burden of proof is on respondents, the Commission's staff should not make or supervise the studies, even if it were large enough to do so. Carefully limited consultation, however, could in the long run save time of everyone concerned.

C. Accounting Adviser to the Commission

In an address on June 18, 1953, former Chairman Howrey called attention to the inability of the Commission or the Hearing Examiners, under the Administrative Procedure Act, to seek the advice of members of the economic staff of the Commission in adversary proceedings. This "serious defect" he would remedy "by attaching economic advisers directly to the Commission, and possibly to the Hearing Examiners, to perform economic functions in the same manner as the General Counsel performs legal functions."

The Committee recommends that the suggestion with respect to an economic adviser or advisers be extended to provide for an Accounting Adviser. Such an adviser could be useful in many ways. His precise status and method of operation would have to be determined by the Commission, but one of his functions would be to advise the Commission on accounting matters arising informally under the Robinson-Patman Act. As part of this function, the Accounting Adviser could prepare a continuing series of accounting opinions, subject to Commission approval, in-

terpreting the cost proviso of the Act. Such opinions would be an authoritative guide to industry and the accounting profession in this field. They would be an effective follow-up of the work of this Committee.

If it were thought desirable for the Accounting Adviser to participate in adversary proceedings, it is recommended that he be subject to call as an expert witness *by the* [fol. 256] *Hearing Examiner* on his own motion or on that of either party. Opposing counsel would be directed by the Hearing Examiner to submit hypothetical questions for study by the Accounting Adviser prior to his appearance on the stand. Upon testifying, he would be subject to cross-examination by opposing counsel. The Hearing Examiner would not be bound by the opinions of the Accounting Adviser but would reach an independent judgment on the accounting issues before him, just as on any other issuable matter. Likewise, the Commission would not be bound by the testimony of the Accounting Adviser. We believe this recommendation is consistent with the provisions of the Administrative Procedure Act. The Accounting Adviser would not consult with opposing counsel, the Hearing Examiner or the Commission in the adjudicatory phases of the proceeding. His role would be that of an expert accounting witness and his testimony would be adduced in conformity with the Administrative Procedure Act. His appearance would not, of course, affect in any way the use of expert witnesses by either party.

D. Pre-trial techniques

In the address previously cited, former Chairman Howrey made the following statement:

> "Surprise and tactical advantages should be frankly eliminated in all administrative hearings. Particularization in pleadings should be accompanied, in the big case at least, by pre-trial procedures involving the identification and authentication of exhibits, exchange of written drafts of the proposed testimony of experts, stipulations of fact not subject to dispute, and a detailed plan for the hearing."

The Committee applauds this statement of policy and urges that it be emphasized in connection with cost justification. Cost accounting issues are difficult enough without having them made more so by reliance on oral testimony which at best is not as clearly thought out and as carefully phrased as testimony should be in so complex an area. Procedures such as those outlined by Mr. Howrey result in narrowing the issues; in defining them in such a way that the Hearing Examiner and all parties may concentrate on matters of substance and not be led astray into matters of insignificance; in a more compact and informative record; and, most importantly, in a saving of time and money to all concerned.

The Committee recommends that particular consideration be given by the Federal Trade Commission to pre-trial techniques, under such rules as may be deemed necessary, in proceedings in which the cost proviso is invoked as a defense. A wholly reasonable prerequisite to the use of such pre-trial techniques would be a requirement that respondents give notice early in the proceedings that the cost defense is to be invoked.

E. Expert testimony

1. The role of the expert witness. The role of the expert witness in cost-justification matters is an exacting and difficult one. As stated earlier, the results of cost accounting cannot be tested by the methods of exact science. In all but the simplest cases the reliability of the evidence [fol. 257] must be tested not only against the accuracy and completeness of the data presented, fortified by proof that it is properly grounded in the facts of the particular business situation under review, but more largely upon the soundness of numerous subjective judgments of the expert witness as to the methods of allocation of expenses, known as "joint costs," common to several classes of products, processes or customers. Accordingly, we think that the following guiding principles should be of material importance in developing and evaluating expert accounting testimony in Robinson-Patman Act matters.

Counsel in support of a cost-justification presentation should be prepared to bring out in the direct examina-

tion of his witness each instance in which costs have been allocated among products, processes or customers. The full basis of each such determination should be made a part of the direct presentation. If alternative methods were available the considerations which dictated the ultimate choice should be stated. If there is reliance upon historical precedent in the particular business or trade the validity of the continued use of the precedent should be established. In other words, reliance upon historical precedent should be justified. The witness should be particularly well prepared to justify the selection of a method of allocation determined by others and adopted by him for the purpose of the study. To have probative force such an adoption by the witness must be his free choice and supported in full by his independent professional judgment. An affirmative assumption by counsel in support of the presentation of the full burden of proof would go far to provide the adjudicator with a sound basis upon which to appraise testimony.

On the part of the counsel in support of the complaint there should be a recognition of the fact that cost differences developed in such presentations are not, and never can be, mathematical exactitudes and that, depending upon the nature of the differing methods or quantities involved, varying degrees of tolerance are necessarily indicated. The emphasis in cross-examination should therefore be on a thorough testing of the bases of allocation.

To the hearing officers and the courts who are to pass upon the reliability, probative force and substance of the cost-justification presentations, an understanding of the nature of such evidence should do much to dispel the mystery and uncertainties that abound in a long and involved record of the testimony incident to such a presentation. The mechanical aspects of the study which relate to the completeness and accuracy of the data presented and the quality of the workmanship may readily be passed upon. In addition, much weight should be given to the caliber of the witness, his apparent professional skill, and his appreciation of the responsibility to deal fairly with the data before him. The soundness of his reasoning in explanation of his methods of allocation is an important consideration. The adjudicator should be mindful, also, that the products of cost accounting procedures are seldom,

if ever, mathematical certainties. The results are apt to represent a range of values within which "due allowance" may be held to obtain.

2. Written opinions. Where a respondent has presented a cost study in written form to the Commission's staff for appraisal, it is recommended that the report thereon by the Commission's accounting staff should also be in the form of a written memorandum, with necessary support-[fol. 258] ing exhibits, and that the report be made available to the respondent. As stated above, the Committee urges the Commission to adopt such rules as it may deem necessary to provide for the pretrial exchange of written drafts of the proposed testimony of accounting experts in cost-justification matters.

F. Continuing accounting opinions

The Committee's present inquiry manifests the desirability of a continuing series of Commission accounting opinions interpreting the cost proviso. Similar plans have been adopted in the public interest by the Treasury Department and Securities and Exchange Commission. As already stated, the proposed Accounting Adviser to the Commission could prepare such accounting opinions, subject to Commission approval. In addition to being an authoritative guide to industry and the accounting profession, such opinions would also serve as the medium through which the work of this Committee could be effectively implemented.

V. Conclusion

The Committee recognizes that the cost proviso of the Robinson-Patman Act operates in a complex area and that many of the problems to which it gives rise are not given to ready solution. Nevertheless, its significance as a means of lawfully reflecting economies of operation in lower prices to the benefit of the consuming public is apparent and every effort must be made to implement its important economic role.

Additional accounting guides not appropriate for or possible in this report will be of help. It is the Committee's hope that this report will stimulate others, such as trade associations and professional groups, to contribute in this field, and that special attention may be focussed on the problems of compliance. Indeed, if the Committee's en-

deavors serve no other purpose, its time would be well spent.

While continued development and clarification is essential in this dynamic field, there is every reason to believe that the objectives of the cost proviso will ultimately be achieved through sound administration of its provisions in the light of accounting and economic realities. It is toward this end that the recommendations of the Committee are directed, and it is earnestly hoped that they will contribute materially to compliance with, and administration of, the cost proviso of the Robinson-Patman Act.

Dated February, 1956.

Respectfully submitted, C. R. Fay, Alvin R. Jennings, E. W. Kelley, H. T. McAnly, Albert E. Sawyer, Otto F. Taylor, Herbert F. Taggart, Chairman.

Released by the Federal Trade Commission, March 23, 1956.

[fol. 259] APPENDIX A

Illustrative Methods and Procedures for Allocating Manufacturing and Distribution Costs

I. Costs of Manufacture

A. In general

What are commonly designated as manufacturing costs (including product development and other prerequisite costs) are likely to be segregated to show cost differences resulting from differing methods and quantities of sale only where goods are made upon customer order. Manufacturing costs applicable for cost-justification purposes are those which vary either directly or indirectly with the factor on which the price differential is based. For example, if the price differential is based on the number of units of product per order, then all those manufacturing costs which vary per unit of product with the size of the order, either directly or indirectly, are generally applicable in the cost-justification process. The amount of the cost difference is equal to the amount of the variation in the per unit cost of the product.

B. Determination of manufacturing cost differences

In applying this general principle to a specific case, the first step is to divide the total expenses of manufacturing into groups, each group representing the total cost of some manufacturing activity or function; for example, product development and design, tooling, production, production control, purchasing, etc. Whether these functional expense groups will tend to vary per unit of product with the price-differentiating factor depends on the circumstances of the situation under review, and can be determined by the use of reason. Assume, for illustration, that all the expenses of the production control operation are considered as one functional group, that the price differential is based upon quantity per sales order, that all goods are manufactured for stock, that all orders are filled from this stock, and that all customers buy comparable assortments of goods. Under these circumstances, since pro-

duction control affects operations prior to finished goods storage, the size of the customer's order will have no direct effect on the production control operation, and it becomes difficult to measure the effect, if any, that production control expenses may have on any cost difference. However, if materials are scheduled into production only after receipt of an order, it is likely that production control cost per unit of product will vary with the size of the order. Certain of the expenses involved will be uniform per order, regardless of its size. Others may vary, but not proportionally. The cost per unit of product will therefore decrease as the size of the order increases, and vice versa.

Examples of other manufacturing cost differences to be recognized because of varying quantities of over-all or individual production orders, traceable directly or indirectly by relative contribution to classes of customers, include: product development and design, tooling, varying manu- [fol. 260] facturing methods, set-up and make-ready, fluctuation in efficiency due to interruptions of production flow, employee training costs, methods and standards development, product costing, and others.

Costs in the manufacturing area which do not directly vary with the price-determining factor, but which can be shown to vary with costs which do so vary, are also applicable to the cost-justification procedure. In many cases the best way to give recognition to this fact is to include a proper proportion of such indirectly varying costs among the costs of the operating functions. In other cases it is more convenient to deal with them separately.

An example of such indirectly varying costs may be vacation pay. If each employee is allowed a two-weeks vacation for which he receives four per cent of his annual wage, this expense varies, not with the size of individual orders, but with the number of payroll dollars. Applicable to each dollar of payroll included in the functional cost grouping, therefore, is an additional four cents for vacation pay. This item may be included among the costs of each separate function in the first instance, or it may be more convenient to compute vacation pay applicable to all payroll items and to add the resultant amount of variations to the answer otherwise obtained. The precise method of computation is unimportant: what is important is the recognition of the

principle, so that complete and accurate results may be obtained.

The preceding illustrations relate to a situation in which the price-differentiating factor is the number of units of product in the sales order. This is not the only possible source of manufacturing cost differences. For example, the timing of orders may be fully as important as their size, and may affect the costs of manufacture, sale, and delivery. If it can be shown, for instance, that orders properly timed with respect to production schedules have a normal cost resulting from orderly scheduling of production factors and processes, whereas ill-timed orders cause interruptions in production flow, require overtime labor, the utilization of abnormal sources of material, and similar excessive costs, cost differences may justify the offering of price inducements for orders placed reasonably in advance or penalties for orders placed on a spot basis.

The principle here is the same as in any other instance. Those functions, the costs of which vary with the price-differentiating factor, are the applicable functions, and the amount of the cost justification is measured by the variation in unit costs.

II. Distribution Costs

A. In general

The costs of sale and delivery are commonly known as distribution or marketing costs. The terms should be construed broadly. The costs of sale and delivery are, in general, the sum of the costs of obtaining sales orders and the costs which are incurred because sales orders have been received. Sometimes these costs are described as "order-getting" and "order-filling" costs. If these terms are understood broadly enough, they clearly describe the costs of sale and delivery. As noted before, the distinction between these costs and costs of manufacture is of [fol. 261] negligible significance for Robinson-Patman Act purposes, since the same rule applies to all.

As in the case of manufacturing costs, the costs which are applicable to the problem of cost justification are those which vary, directly or indirectly, with the factor on which the price differential is based. A wide variety of such

factors may give rise to variations in the costs of sale and delivery. The number of units per order, the total volume of purchases over a period of time, the timing of orders, the selection of modes of delivery or of channels of trade, and many other circumstances surrounding sales transactions may affect the unit costs of sale and delivery.

B. Functional method of distribution cost analysis

While in individual cases other approaches to the technique of cost analysis may be preferable, and should be acceptable to the Commission, the functional method has many advantages. This involves the collection of distribution costs by operations or functions. The term "function" in distribution cost accounting is comparable to "cost center" in manufacturing cost accounting. A distribution function may be defined as an operation or activity at the lowest practical level of supervision for which costs can be isolated and collected. Organization lines tend to follow functions performed. Thus the cost functions will tend to coincide with lines of authority and responsibility as established by management.

Among the considerations of importance in classifying distribution cost functions are the following:

1. Cost functions should include only similar operations. The commingling of unlike activities, with different rates of change relative to the price-differentiating factor, will be confusing, even though they may be under the same supervisor.

2. An organizational division or department may perform only one function, but it frequently embraces several.

3. The size of a specialized distribution operation has no necessary relationship to whether or not it shall be considered as a function for cost justification purposes. Such a function may be the aggregate of several accounting units established for internal control purposes.

Since methods of organization and operation differ among companies and industries, distribution cost functions also differ. The examples and definitions given be-

low, therefore, must be understood to be purely illustrative and not to be exhaustive, conclusive, or such as would fit any specific company. The illustrations are used merely to put into concrete terms the principles which the Committee has in mind.

The following might be the distribution cost functions of an integrated manufacturing company:

Transportation	Warehousing
Advertising	Operating Service
Sales Promotion	Sales Accounting and Credit
Selling and Technical Service	Sales Management.

The transportation function includes the cost of transporting the goods from the place of production to the market in which they are to be sold, and then to the cus- [fol. 262] tomer. Transportation may require one or more movements and involve several types of transportation facilities.

The advertising function is the cost of demand creation through non-personal presentation of goods or services. The usual means are newspapers, magazines, radio, television, outdoor signs, motion pictures, direct-mail, and catalogs.

The sales promotion function is similar to the advertising function in that its purpose is demand creation. This function differs from advertising only in the medium used. Mass circulation methods are not involved. Instead, the costs cover the display of the product itself, the use of point-of-sale material, the making of demonstrations, or the giving of premiums.

The selling functions involve those costs for the activities of personnel engaged in personal demand creation through direct contact with prospective buyers or their customers. They also include technical services performed for the purpose of aiding customers and prospective customers in the use of the products or service, giving technical advice and assistance in the operation of the customer's business.

Warehousing comprises the storing and handling of goods. The costs are primarily for space, stock handlers, and stock handling equipment.

The operating service function includes the cost of sales office clerical work and administration of the physical aspects of the distribution operations. Usually these activities are of greater cost importance when an organization is decentralized than when it is centralized.

The sales accounting and credit functions include the cost of billing, sales statistics, inventory accounting, accounts receivable and credit.

Sales management is a function which represents the responsibility for the entire marketing operation. Included in this function may be the determination of what to produce or purchase for resale, how much to make, when it should be procured or manufactured, where the products can be sold, and who will sell them.

It is to be noted that all of the functions thus described are subject to vertical subdivision for cost analysis purposes, the character and degree of such subdivision depending on the variety of tasks performed in each function, the specialization of supervision and personnel, and the purpose of the analysis. Such subdivisions are often called subfunctions, but their nature and significance are identical with the functions earlier described. The functions are also subject to horizontal subdivision in terms of geography, product lines, channels of trade, and the like. These subdivisions are apt to be very important for reduction of the scope of a cost study by elimination of costs not germane to the inquiry and by confining attention to an acceptable sample.

The costs of each distribution function consist of the familiar natural expense categories found in every classification of accounts, such as salaries, supplies, travel, communication, space costs, insurance, taxes, and so forth.

Having established satisfactory functional cost categories, it remains to determine costs by segments of the business, such as products or customers. For this purpose, costs may be roughly divided into two groups: those [fol. 263] which are direct as respects the business segments involved, and those which are not. Direct costs are those which can be readily identified with the segment being costed. The application of these direct costs to specific segments of the business can be definitely measured, and

no problems of proration or allocation exist. (It should be noted that costs which are direct as to certain segments, e. g., products, may be indirect as to other segments, e. g., customers, and vice versa.) Direct costs are usually identified with the units or segments to be costed at the time they are incurred—in other words, in the basic account classification and the original recording of expenses.

After ascertaining the direct costs, it remains to assign the indirect costs. These costs are collected as totals of functions not chargeable directly. Assignment of these indirect costs is done by measuring the activity or output of the function in terms of units of functional service which can be counted or measured, and then applying to each business segment the amount of the functional cost which is in proportion to its use of or responsibility for the units of functional service.

A simple example makes this process clear. If the function is personal selling, one possible unit of functional service in a customer analysis may be sales calls. If customers are divided into classes A, B, and C, and if 10 per cent of the calls are made on Class A, 30 per cent on Class B, and 60 per cent on Class C customers, then the three classes share the cost of personal selling in those proportions.

Procedure for other functions is similar. The steps are as follows:

1. Ascertain the total cost of the function.
2. Decide on an appropriate service unit by which the performance output of the function may be measured.
3. Measure the number of service units required by each segment to be costed—in the example above, by the three classes of customers.
4. Apply the costs of the function to the segments in proportion to the service units required.

Having measured or computed all direct and indirect functional costs, the total cost of each business segment is the total of the items so ascertained. Cost differences are then computed per unit of product, per dollar of actual or list sales, or in such other terms as may be appropriate.

C. Principles of functional costing

While it is not intended to list all conceivable functions with service units available for each, or otherwise to particularize, a few observations may be useful guides to functional costing.

At the outset, caution should be exercised with respect to overemphasis on the distinction between direct and indirect costs. This distinction should not be made for minor items of cost or for those where treatment of potentially direct items by a satisfactory application of the indirect procedure will produce completely reliable results. Substantial elements of direct costs are ordinarily so designated and recorded in the original bookkeeping process. Establishment and maintenance of the necessary bookkeeping routines for isolating all direct costs is burdensome and is justified only where amounts involved are appreci- [fol. 264] able and satisfactory results cannot be obtained by other and less expensive methods. In many cases the indirect functional approach, using an uncontroversial unit of functional service, will produce acceptable results.

Functions vary widely in their closeness to the business segments being costed. Some such relationships are very close and the appropriate measuring factor (the service unit) is easily identified and perhaps easily counted in total and in relation to the segments. The relationships of other functions to the costing segments are more remote, and the choice of a service unit which will adequately measure a given relationship is of greater difficulty. In many cases more than one service unit might be chosen. The precise choice will depend on two main considerations: (1) which service unit most closely approximates a satisfactory measure of benefit or activity in terms of rational analysis; (2) which service units can most readily and economically be counted both in total and in terms of the costing segments. Different service units will yields different dollars-and-cents results, and a particular service unit should not be chosen merely because it maximizes cost differences. Where the choice is otherwise a matter of indifference, however, there can be no objection to the choice of the method which produces the most desirable result.

The choice of both functions and service units must be in accordance with the circumstances of each case. To the extent that the functions listed heretofore cannot be assigned directly, the service units shown below have been found useful. Some of the units are more appropriate for commodity analysis than for customer analysis, and vice versa.

Transportation: the ton-mile, a weight unit not modified by distance, a bulk unit, a customer stop.

Advertising: square inches of advertising space, time of advertising personnel, number of pieces of advertising material furnished (direct mail and dealers' helps), number of commercials.

Sales promotion: number of promotional calls, time of sales promotion personnel, pieces of promotional literature.

Selling and technical service: number of calls, time spent in calls. Time spent in travel to and from territory and between customers is often handled on per-call basis, even though time with customers is used for direct selling.

Warehousing: space or volume units for storage; weight or volume units for receiving and shipping; time units, invoices, or invoice lines for order-filling costs.

Operating service: treated as overhead of selling and technical service function and allocated on same basis.

Sales accounting and credit: number of orders or invoices or invoice lines, number of transactions, number of accounts.

Sales management: treated as overhead of the functions managed, and allocated either on basis of all costs previously charged or on basis of payroll of persons supervised.

[fol. 265] Robinson-Patman Price Discrimination Act

(Act of June 19, 1936, Chap. 592, 49 Stat. 1526; 15 U. S. Code, Secs. 13, 13a, 13b, 21a.)

An Act to amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

[Amending Section 2 of Clayton Antitrust Act]

[Section 1.] That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows: [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526.]

[Price Discrimination and Quantity Discounts]

"Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission

may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Burden of Rebuttal—Meeting Competition]

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that [fol. 266] his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Brokerage Commissions]

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Payments for Services and Facilities Furnished by Customer—Advertising Allowances]

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Furnishing Additional Services or Facilities]

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on pro-

portionally equal terms. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Unlawful to Induce or Receive Discrimination]

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Pending Litigation as to Federal Trade Commission Orders]

Sec. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used, or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as [fol. 267] amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to

the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken. [June 19, 1936, Chap. 592, Sec. 2, 49 Stat. 1527; 15 U. S. Code, Sec. 21a.]

[Participation in Discrimination]

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. [June 19, 1936, Chap. 592, Sec. 3, 49 Stat. 1528; 15 U. S. Code, Sec. 13a.]

[Penalty for Violations]

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both. [June 19, 1936, Chap. 592, Sec. 3, 49 Stat. 1528; 15 U. S. Code, Sec. 13a.]

[Cooperative Associations]

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association. [June 19, 1936, Chap. 592, Sec. 4, 49 Stat. 1528; 15 U. S. Code, Sec. 13b.]

	Page
Accounting advisor, Federal Trade Commission	19
Accounting, cost	
concepts	10
proof principles	10
Accounting costs	28
Accounting opinions, Federal Trade Commission	22
Advertising costs	28
Advisory Committee on Cost Justification	
formation	5
members	22
objectives	5
Aggregate prices	8
Allocation of manufacturing and distribution costs, methods and procedures	23
Allowances	7
Anticipated costs	10
Apportionment of indirect costs	16
Average prices	8
Cash discounts	8
Classification of commodities, customers, orders, transactions	11
Commodities, classification of	11
Consultation facilities, Federal Trade Commission	19
Cost analysis	
functional method of distribution	25
methods and procedures	13
problems	17
Cost data	11
Cost of distribution	
allocation methods and procedures	24
Cost of manufacture	
allocation methods and procedures	23
differences, determination of	23
Cost studies, "good faith"	11
Cost surveys	11
Costs	
allocation methods	23
analysis, methods of	14
anticipated	10
apportionment	16

	Page
areas of	11
data	11
delivery cost differences	9
differences	15
direct	15
incremental	13
incurred	11
indirect	15
manufacture, sale, or delivery	15
multiple-plant	18
sampling	12
surveys	11
time studies	13
variations	13
Credit costs	28
Customers, classification of	11
Delivered prices	7
Delivery cost differences	9
Direct costs	15
determination of	16
variations with sales price	17
Discounts	7
cash	8
Distribution costs	
allocation of	24
functional costing	27
Expenses	
salesmen	17
Expert testimony	
oral opinions	20
written opinions	21
Federal Trade Commission	
accounting advisor	19
accounting opinions	22
action on Report of Advisory Committee on Cost Justification	22
consultation facilities	19
expert testimony	20
organization	18
pre-trial techniques	20
procedures	18
Functional costing	27

	Page
"Good faith" cost studies	11
Incremental costs	13
Incurred costs	11
Indirect costs	15
apportionment	16
methods of determining	16
Management costs	28
Manufacturing costs, allocation of	23
Multiple-plant costing	18
Orders, classification of	11
Pre-trial techniques, Federal Trade Commission	20
Price defined	6
Price differentials	6
Prices	
aggregate	8
average	8
comparisons	8
delivered	7
Rebates	7
Report of Advisory Committee on Cost Justification	
conclusions	22
Federal Trade Commission action on	22
purpose	5
scope	5
Robinson-Patman Price Discrimination Act	
accounting	14
cost analysis	14
"cost," meaning of	13
cost proviso	6
"due allowance," meaning of	9
"resulting from," meaning of	9
text	29
Sales promotion costs	28
Salesmen, "missionary" expenses	17
Sampling	12
Selling costs	28
Service costs	28
Time studies, substitution for	13
Transactions, classification of	11
Transportation costs	28
Warehousing costs	28
Zone costing	18

[fol. 269] TAGGART DEPOSITION EXHIBIT No. 2

UNITED STATES v. THE BORDEN COMPANY ET AL.,

Civil Action No. 51 C 947

DOCUMENTS FOR REVIEW BY EXPERT WITNESS

I. Transcript Volume 8 of civil trial, No. 51 C 947
II. Government's pre-trial orders for
    A. Bowman
    B. Borden
III. Bowman documents—cost defense
    A. Wholesale store accounts
        1. "Manual"
        2. Discount tests: March 1955, September 1955, and January 1956
        3. Government's cost analysis memos:
            (a) July 10, 1956
            (b) February 6, 1957 Revision
        4. Bergfield Deposition (Volumes I and II)
    B. Bulk wholesale accounts (restaurant)
        1. Bowman cost analysis—March 1956
        2. Government's memo: Analysis of cost and price differences based on Bowman data (January 18, 1957)
    C. Bowman proposed pre-trial order (subject to revision)
IV. Borden stores—cost defense
    A. Wholesale store accounts
        1. Cost defense brochure Borden's 1955
        2. Government's memo—Cost defense analysis September 25, 1956
        3. Malone deposition
        4. Borden abstract of Malone deposition for inclusion in proposed pre-trial order

Webster 9-2395—Mr. Earl A. Jinkinson, Esq., Chf. Midwest Office, Antitrust Div., U. S. Dept. of Justice, Room 404, Fed. Dist. Court House, Chicago, Ill.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendant.

Deposition of Albert E. Sawyer—Filed February 13, 1959

The deposition of Albert E. Sawyer, called by the defendants for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe a notary public within and for the County of Cook and State of Illinois, in Room 756, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Wednesday, April 16, 1958, at 1:30 o'clock, p.m.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

[fol. 2] Mr. Stuart S. Ball, Mr. H. Blair White, and Mr. Joseph Greaves, on behalf of defendants The Borden Company and Belmont Dairy Company;

Mr. Edward L. Hart, Jr., and Mr. John P. Stevens, on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

[fol. 3] Mr. Jinkinson: Let the record show, of course, that this is a discovery deposition, being taken by Borden and Bowman with reference to direct testimony proffered by Mr. Sawyer in both the Borden and the Bowman plaintiff's rebuttal pre-trial order as to both companies, in Civil No. 51 C 947.

ALBERT E. SAWYER, having been first duly sworn, was examined and testified as follows:

Cross-examination.

By Mr. Ball:

Q. Mr. Sawyer, have you got a copy before you of the Government's rebuttal pre-trial order as to the Borden Company, or, rather, a draft of such an order?

A. Yes, I have.

Q. Would you turn, please, to Page 17 and particularly to Paragraph 12?

A. Yes.

Q. And tell us whether you have either a list or any record of the documents of information that were furnished you by representatives of the plaintiff and used by you in the preparation of your testimony?

A. Such a list is available.

Mr. Ball: Have we got that, Mr. Jinkinson?

[fol. 4] Mr. Jinkinson: Yes. I might say for the record it is identical to that furnished to Professor Taggart which appears as——

Mr. Ball: As Taggart Deposition Exhibit No. 2?

Mr. Jinkinson: Yes.

[fol. 5] Mr. Jinkinson: Yes.

Q. Now, I hand you what has been previously marked as Taggart's Deposition Exhibit No. 2 and disregarding the handwriting at the bottom which I take it is that of Professor Taggart.

Mr. Jinkinson: No, that is Professor Woolley.

Mr. Ball: Mr. Woolley?

Mr. Jinkinson: Yes. I believe he put that on there.

By Mr. Ball:

Q. I will ask you is this a complete list of the documentary material that was furnished you in preparation for your testimony?

A. Yes. It is a complete list of such material.

Q. With which representative of the Government did you confer?

A. I conferred with Mr. Woolley on two or three occasions and on one occasion with Mr. Jinkinson.

Q. Well, will you identify, if you can, the dates of your conferences and inform us as to the amount of time that was spent in each of them?

A. The first one, I believe, occurred in May of 1957 and was merely a conference as to my availability.

Q. That conference was with whom?

[fol. 6] A. Mr. Woolley.

Q. Mr. Woolley?

A. Yes.

Q. Was that then preceded by any correspondence, Mr. Sawyer?

A. No. I think it was preceded only by long distance telephone call which my partner took because I was out of the city to determine if I would be available for the conference of the next day.

[fol. 7] Q. Do you recall how long that conference took?

A. Less than an hour.

Q. Do you recall what Mr. Woolley said to you about the case at that time?

A. Only a general description. No documents were exhibited, but a conference to determine my availability to undertake this assignment.

Q. Did Mr. Woolley recite to you any of the facts involved in the litigation?

A. No. It was a general discussion of the type of litigation of the type of subject matter.

Q. When was the next conference you had with a representative of the Government?

A. I am not just sure of the date. I think it was in July.

Q. Of 1957?

A. Yes.

Q. With whom was that conference held?

A. That was with Mr. Woolley and at that time he brought with him some—a substantial number of this list of documents.

Q. Can you identify which of the list of documents he submitted to you at that time?

[fol. 8] A. I know that the No. 1 and some of No. 3.

By Mr. Hart:

Q. Will you identify that for the record by name, Mr. Sawyer, a description of them?

By the Witness:

A. Roman numeral I, Transcript Volume 8 of Civil Trial 51 C 947 and some of the documents I would have to refer to, the correspondence in which this material was forwarded. And Roman numeral III, Bowman documents Cost Defense. I am not certain that everything under that caption was submitted at that time and some of the material under Roman numeral IV, the so-called Bergfeld deposition and the Malone deposition were not received by me until later. I think they have been submitted to Professor Taggart first and forwarded to me by Professor Taggart.

By Mr. Ball:

Q. Have you any correspondence that would fix the date or the approximate date on which you received these documents?

A. I don't have that correspondence with me.

Q. You have it available in your files?

A. Yes, I do.

Mr. Ball: I ask, Mr. Jinkinson, if you have it available [fol. 9] here would it be possible——

Mr. Jinkinson: We have copies.

Mr. Ball: Copies of it here from your file?

Mr. Jinkinson: Yes.

Mr. Ball: I wonder if we could refer to the correspondence between yourself and Mr. Sawyer for the purpose of this examination?

Mr. Jinkinson: The Government must respectfully decline to make public its files, having been told on many occasions by the Attorney General it is against the policy of the Department of Justice.

Mr. Ball: So your refusal to produce these papers for the purposes of this cross-examination extends to the correspondence transmitting the documents to Mr. Sawyer?

Mr. Jinkinson: That is right.

Mr. Ball: That includes, of course, the document described here as Government's Memorandum Analysis of Cost and Price Differences Based on Bowman Data and Government's Memorandum, Cost Defense Analysis of [fol. 10] September 25, 1956, relating to Borden's Source, Cost Defense?

Mr. Jinkinson: That is right.

Mr. Ball: Well, now, referring to this second conference which you had with Mr. Woolley which took place——

Mr. Hart: Could we find out whether the witness also refuses to produce his copies of that correspondence?

[fol. 11] Mr. Hart: Just for the sake of order, could we find out whether the witness also refuses to produce his copies of that information?

By Mr. Ball:

Q. Do you have any of the material listed on Taggart's Exhibit—Taggart's Deposition Exhibit No. 2 in your files at this time, or copies thereof.

A. No, I think, outside of these pretrial orders, I have none of the documents listed thereon.

Q. And, by pretrial orders you mean the two draft orders which contain the draft of your testimony?

A. That is correct.

Mr. Hart: I am talking about the correspondence Mr. Jinkinson refuses to supply.

Mr. Ball: Oh, yes.

By Mr. Ball:

Q. Do you refuse also to produce the correspondence you had with the Department of Justice as well?

A. I would have to respect the wishes of the Department in that regard, I think.

Q. Now, so the record may be clear, I now ask you to produce that correspondence subject to the physical getting of it here from your files, and I take it in response to this you refuse to produce it.

[fol. 12] A. Yes, I do.

Q. To whom did you return the documents that appear on Taggart Deposition Exhibit No. 2?

A. To Mr. Jinkinson.

Q. And that was in person?

A. Partly in person and partly by mail.

Q. In other words, at different times.

A. At different times, yes.

Q. Was there any one time when you had all of the documents listed in your possession at the same time?

A. I do not believe there was.

Q. Did you make any notes of the contents of these various documents?

A. Yes, I did.

Q. Do you have those notes with you?

A. I do have notes but I do not have those notes with me.

Q. Will you produce those notes?

A. I think they would come under the same category as the other material.

Q. I understand then that you refuse to produce the notes?

A. I refuse to produce them.

Q. Referring again to the second conference that you [fol. 13] had with Mr. Woolley, how long did that conference take place, or how much time did that conference consume?

A. As I recall, it was about a half day.

Q. And what was the nature of your conversation with Mr. Woolley?

A. Explanation of the various documents and an indication of the areas in which it was desired that I express my judgment.

[fol. 14] Q. Did Mr. Woolley state to you opinions he had formed with respect to various aspects of the cost studies?

A. No.

Q. Looking again at Taggart Deposition Exhibit No. 2, I call your attention here under III-B-2, Government's Memo, Analysis of Costs and Price Differences Based on Bowman Data, January 18, 1957, and also the item under IV-A-2, Government's Memo, Cost Defense Analysis,' September 25, 1956; I ask you if Mr. Woolley either gave you those documents at this time or had previously furnished you with them?

A. I think he had previously furnished them, as I remember.

Q. Will you describe how long these two documents were?

Mr. Jinkinson: Now, I am going to object to that question for the reason that it is irrelevant and immaterial, and I direct the witness not to answer it, because the question calls for consultation between the Government employee and Mr. Sawyer which was obviously on a confidential basis and privileged testimony.

[fol. 15] I direct the witness not to answer the question.

By Mr. Ball:

Q. Do you adhere to the direction of Mr. Jinkinson?

A. Yes, I do.

Q. Did these documents contain any statements of fact as to the operation of the dairy business by Bowman and Borden?

A. I believe there was material descriptive of those operations.

Q. What were the areas with reference to the two reports upon which Mr. Woolley asked for your opinion?

A. Well, those areas are set forth in this direct testimony starting out with a discussion of what I regarded as the basic principles.

Q. Yes; but I am asking you what areas of the Bowman and Borden reports did Mr. Woolley ask you to express your opinion about?

A. Well, I am trying to answer you completely on that. It was not so much the areas of the Bowman and Borden reports as the areas of the Robinson-Patman problem that is presented in this case.

Q. Did Mr. Woolley discuss with you any possible deficiencies in either of the two studies, other than those that [fol. 16] are covered by your testimony set forth in this draft order?

A. I do not know whether I am entirely clear as to the question.

Q. Did Mr. Woolley suggest the possibility of deficiencies in either the Bowman or the Borden report on matters that are not—on specific matters that are not discussed in your testimony in the draft order?

A. I do not believe he did. I think everything is presented here.

Q. In other words, did he talk with you about anything other than possible deficiencies in the central overhead, allocation of drivers' time to and from the route areas and the matter of compensation of the drivers?

A. Yes, those were the things that we discussed.

Q. And those were the only three subject matters that were specifically dealt with?

A. I do not recall any matters relating specifically to either Borden or Bowman.

Q. Now, during the conversation that you had with Mr. Woolley on the second meeting, did he give you any information in addition to the documents concerning the facts of the case or his views thereon?

A. I do not recall even much discussion on his views as [fol. 17] such. These documents came to me, they were for my review, and I think he understood, as I did, that I would take this material, study it and express my opinion as to the principles that should apply.

[fol. 18] Q. Prior to this—oh, excuse me.

A. (Continuing) That was not the time to discuss his particular views on the matter. I had not had the opportunity to discuss or to study the rather voluminous amount of material.

Q. You had not, therefore, I take it, made any study of that material prior to this second visit you had with Mr. Woolley.

A. I do not think I had. I do not recall now having received anything prior to that time.

Q. Then after this visit of Mr. Woolley you did proceed to study this material.

A. I did, yes.

Q. And will you tell us approximately how much time you spent on the study of this material and approximate the time in which you made this study.

A. I cannot recall now. I think somewhere in the neighborhood of forty or fifty hours' time, in the course of which I made certain notes.

Q. Now, did you furnish copies of your notes to Mr. Woolley?

A. No.

Q. Were those notes in pencil, or ——

A. Yes, they were in my handwriting.

[fol. 19] Q. They had not been typed out?

A. No.

Q. Now, did that estimate of time of forty or fifty hours include time with which you were meeting or a consultation with Mr. Woolley or Mr. Jinkinson?

A. No; I would say that over and above the forty to fifty hours I had, as I said, approximately a half a day with Mr. Woolley at the time the documents were delivered and one other conference at the time, when my studies had been completed.

Q. Can you fix an approximate date of that second conference?

A. I think it was in September, sometime.

Q. I gather in 1957?

A. That is correct.

Q. And that conference took place at your office in Washington?

A. Yes, it did.——

Mr. Jinkinson: In New York.

The Witness: In New York. Excuse me.

Mr. Ball: In New York.

By Mr. Ball:

Q. And how long did that conference take?

A. As I recall, the forenoon and perhaps about an hour [fol. 20] after lunch.

Q. Now, I take it you considered all the documents that are listed in Taggart Exhibit No. 2 for identification in formulating your conclusions and opinions, as set forth in the draft order?

A. Yes. I went through all of these documents and took note of those things that were relevant to, in my judgment, to an appraisal of the principles embodied in both studies.

Q. Now, I do not think I asked you how long the September conference with Mr. Woolley took place?

A. Well, that was my last answer. My last answer was intended to cover that. That was the forenoon and about an hour after lunch.

Q. Was Mr. Woolley the only one present at the conference, or——

A. Yes.

Q. Now, will you recall as best you can what Mr. Woolley said to you in the course of that meeting?

A. Well, he did not have too much to say. I did most of the talking.

Q. Did you at that time, or any time subsequent, furnish Mr. Woolley with a draft of what you would propose as your testimony in this matter?

[fol. 21] A. On the day following Mr. Woolley's visit to my office in September I wrote out substantially what appears in this document in this same form.

Q. And then did you send that to Mr. Woolley by mail?

A. No. As I recall, he spent that day in New York with another witness, Mr. Taylor, and he returned to my office either late on the day or the day following for just a few minutes, during which I delivered to him a transcript of what I had prepared.

Q. Where prior to that time had you seen any other documents or any other written material with reference to this matter, other than the correspondence you had had with Mr. Wool-ey and Mr. Jinkinson?

A. I think this embraced the total.

Q. Had you seen a draft of any proposed testimony by Professor Taggart?

A. No, I had not. My first acquaintance with that was this document, when this document was given to me.

Q. After it was prepared in its present form?

A. Yes, yes.

Q. Now, I notice a very interesting exact parallelism in wording, Mr. Sawyer, between the last sentence of Paragraph 12, which professes to be your testimony, and the last sentence of Paragraph 10, and I ask you if the [fol. 22] wording of that sentence is your wording?

Mr. Jinkinson: What page is that?

Mr. Ball: The two pages involved are page 6 and page 17.

Mr. Woolley: Page 6 and page 17?

Mr. Ball: Yes.

Mr. Hart: In other words, Taggart's is on 6 and Mr. Sawyer's is on 17.

Mr. Ball: That is right.

By Mr. Ball:

Q. I have reference to the sentence with regard to the principles underlying a properly conceived system of distribution, and so forth. I wanted to find out who was the author of those words.

A. Well, I must say that I wrote those that appeared on page 17.

Q. Are you confident that isn't Mr. Woolley's redraft of your material?

A. I would have had to say something like this and in about those words.

[fol. 23] Q. Well, now, had you before you at that time anything that amounted to a system of distribution cost accounting by Borden or Bowman?

A. Well, I was referring, I suppose, to what is called a manual. There were two or three documents.

Q. Now, will you identify what you have in mind?

A. Well, III-A-1, "Manual" and III B-1, Bowman Cost Analysis, March, 1956.

Then there is IV-A-1, Cost Defense Brochure, Borden's, 1955. And I would also have referred to some of the material in the Malone deposition and the Bergfield deposition. In each of those cases, as I recollect, there was a discussion of the accounting procedures.

Q. Well now, it is true, is it not, that the cost defense brochure of Borden's, 1955, was, and you saw it, was a draft of a pre-trial order?

A. I do not recollect clearly the exact form of some of these documents and I would not say.

Mr. Ball: Well, what was the brochure, gentlemen? I fail to identify it by its description. I cannot identify it right now. I have reference here, Mr. Woolley, to IV-A-1 [fol. 24] I assume that that was our first draft of the pre-trial order.

[fol. 25] Mr. Woolley: Containing this in here, you know

Mr. Ball: What I am trying to say is was it prepared as an initial draft of the pre-trial order, is all

Mr. Woolley: No, it was not in the pre-trial order in that form. It is this cost study that Mr. Malone prepared, containing all of those documents and information you have got in here. It was incorporated in the pre-trial order, but was not part of the pre-trial order at the time.

Mr. Ball: It was the black bound volume that had numbered paragraphs——

Mr. Woolley: Containing statistics.

Mr. Ball: —that were rewritten in part and added to and became the pre-trial order, am I correct?

Mr. Woolley: Yes, but there was nothing in a technical sense in the pre-trial order at the time.

Mr. Ball: No, but it was submitted, if I recall, as a draft of a possible pre-trial order to you. That is what [fol. 26] I had reference to.

Mr. Woolley: I don't know anything about that.

Mr. Long: I don't think at that time we so understood it. I think at a later pre-trial——

Mr. Jinkinson: We called it as we named it here. I don't know whether you put any name on, but this is the name we have (indicating).

Mr. Ball: What I am trying to do is to identify exactly what that is.

Mr. Jinkinson: Well, that is the name we gave to it.

Mr. Woolley: It is that cost study that you made and offered to us for review, and I called it "brochure" to identify it. There seemed to be no particular identification.

By Mr. Ball:

Q. Well now, what do you understand by "system of distribution cost accounting"? Doesn't that refer to a system of continuous accounting, Mr. Sawyer, as you would [fol. 27] normally intend the words?

A. No, it would include special studies of distribution costs which might be undertaken either for management purposes or matters of this kind. I might add that distribution studies are frequently not a part of the daily routine of accounting, in most instances.

[fol. 28] Q. That is especially true in the field of distribution costs?

A. It is especially true in the field of distribution costs, yes.

Q. Now, have you got in your files a copy of your draft of your proposed testimony that you submitted to Mr. Woolley?

A. I think I have.

Mr. Ball: I was going to ask first that that draft be produced from the files of the Government, if they have it available.

Mr. Jinkinson: The Government must respectfully decline for all of the reasons heretofore given.

By Mr. Ball:

Q. Now I ask you, Mr. Sawyer, if you will furnish your draft of that copy.

Mr. Jinkinson: I will direct the witness not to answer the question.

Mr. Ball: You will not even let him refuse to produce it, is that it?

Mr. Jinkinson: No, that is true. This is off the record.

(Discussion off the record.)

[fol. 29] By Mr. Ball:

Q. Now, at any time in the course of your study of this matter did you ask Mr. Woolley or anyone associated with him for additional facts and information?

A. I may have asked him as to the relevance or part certain of these documents played, and what some of the key issues were, not having read the full record of the proceeding.

Q. Now, having given this draft of your proposed testimony, what was the next discussion that you had with any representative of the Government, or the next communication?

A. I think there was a communication in which Mr. Jinkinson or Mr. Woolley asked me to amplify one particular paragraph.

Q. Do you recall what paragraph that was?

A. I don't offhand. It is along towards the end of my study.

Q. Will you glance at it and see if you can refresh your memory as to which paragraph that was?

(Discussion off the record.)

By Mr. Ball:

Q. (Continuing) Go ahead if you have got your answer, Mr. Sawyer.

[fol. 30] A. I am not entirely certain, and I believe it was on page 21, the paragraph marked "H". Perhaps Mr. Woolley can correct me if I am wrong.

Q. Did Mr. Woolley write you a letter about this subject at that time, or was this a telephone call?

A. This was, as I recall, a letter.

Q. Do you recall the length of the letter?

A. One page.

Q. Do you recall whether that contained any statements of fact that he thought you should take into consideration?

A. No, it contained no statements of fact, but my original wording did not—it was not entirely clear as to what I intended, and as I recall I added, I believe I added the sentence which begins in the middle of—"This includes a variety of activities" and so on. Those sentences explain in more detail——

Q. In other words, the last three sentences of Paragraph H that appears on page 21.

A. That is correct.

Q. At any time did you see the draft of the testimony of Mr. Taylor?

A. No, I did not.

Q. Did you at any time have any discussions with Mr. [fol. 31] Taylor?

A. No, I did not.

Q. Did Mr. Woolley at any time inform you of the positions taken either by Professor Taggart or Mr. Taylor on any of these matters?

A. No, it was understood that we would not consider or discuss one another's reactions.

Q. And what was the next step that occurred after you received this request for a redraft of your Paragraph H?

A. I believe that sometime later—I believe it was ap

proaching the end of the calendar year—I received a copy of the two documents I have here, Plaintiff's rebuttal, pretrial order, as to both Borden and Bowman.

Q. And you made no suggestions for changes of wording at that time?

A. No.

Q. Are there any changes of wording that you would make now if you had a chance to review it?

A. I reviewed this yesterday, and I find it expresses my opinion satisfactorily.

Q. Based on what information you have?

A. Yes, yes.

Q. Mr. Sawyer, in exactly what capacity are you ex- [fol. 32] pressing an expert opinion? Is it as a lawyer informed about the Robinson-Patman Act, as an accountant, or exactly in what field of expertize does this express your views?

A. I would classify this as being an accounting opinion.

Q. In other words, you intended to confine your expressions of opinions to those of an accountant upon the subject matter, rather than those of a lawyer?

A. To the extent that it is possible for one to exclude from one's own mind, one's expert views in a kindred discipline.

Q. You have, yourself, participated in the solution, as a lawyer, of Robinson-Patman Act questions, have you not?

A. Yes, I have.

Q. And you have given considerable study as a lawyer to the problems of the Robinson-Patman Act?

A. Yes, I have.

Q. And you have formulated certain opinions as a lawyer, both as to the meaning of the Act and as to the procedure that it best be followed by lawyers in the presenting of problems under the Act?

A. Yes.

Q. And it is very difficult to separate that kind of an [fol. 33] opinion from that which might be said to be purely the reaction of an accountant to the problems, is that correct?

A. Yes, I think that is fair to say.

[fol. 34] Q. Have you at any time had any personal familiarity with the dairy industry?

A. No, not the dairy industry in its strict sense.

Q. Well, what is the closest you have ever come to an acquaintance with the dairy industry?

A. The very similar techniques of distribution appear in, we will say, the distribution of baker's yeast, such as was undertaken, was the subject of the Trade Commission's case against the Standard Brands Company.

Q. Upon what facts do you base your conclusion that the distribution of baker's yeast is similar to the problem of distribution of fluid milk?

A. Well, the wagon distribution approach is very much the same mechanics involved.

Q. Well now, where have you any acquaintance with the mechanics involved in the distribution of fluid milk?

A. Well, I rode with a wagon salesman in selling and delivering and picking up aged products for the Fleischman Yeast of Standard Brands.

Q. That was in connection with the sale of baker's yeast?

A. Yes.

[fol. 35] Q. You have never had a similar experience, however, with respect to the fluid milk industry?

A. No, I have not ridden on wagons.

Q. And you have assumed, in the opinions you have expressed, that the methods, assignments, and techniques are comparable between the two industries, is that correct

A. Roughly so. I recognize some distinctions, but roughly it is the same general type of distribution.

Q. Well, I would say that your actual factual basis for that statement would be based solely upon information you derived from the documents listed in the Taggart Deposition No. 1, and your conversations with Mr. Woolley, is that correct?

A. Yes.

Q. I mean Deposition No. 2.

A. That is correct.

Q. Have you ever read any of the literature dealing with studies of distribution costs in the milk industry?

A. No.

May I go off the record at this point? I just want to interpose one fact which I think is——

Mr. Ball: It is all right with me.

Mr. Jinkinson: It is all right with me.

[fol. 36] Mr. Ball: Yes, go ahead.

(Discussion had off the record.)

By Mr. Ball:

Q. You are not familiar with any of the writings of the men at the University of Minnesota and at the University of California on the costs of distribution of fluid milk?

A. No, I am not.

Q. You were, I recall, a member of the so called Taggart Committee which in the years 1953 and 1956 made some numerous studies and published a report known as the Cost Justification Report which has been identified here as Taggart Deposition Exhibit No. 1?

A. Yes, I was a member of that Committee.

Q. Are you in agreement with the opinions expressed in this report?

A. Yes, I am.

Q. Are there any areas in which you are in dispute with the positions taken by the Committee on this report?

A. No; there were some things, as I think each member of the Committee would state, that would be worded differently if they were worded by the individual members, but I am in agreement with the substance of the report.

[fol. 37] Q. Well, putting it this way, your differences are differences of wording and not of principle, is that correct?

A. Yes, I think that is true.

Q. I would like to call particular attention to certain facets of this report and ask you if they express your considered present opinion.

A. Yes.

Q. I call your attention to Page 8 of the copy in front of you, to the paragraph numbered 5, which I would like to read:

> "The prices to be compared in Robinson-Patman Act cases may be those of the individual commodities, or of a group or 'set,' where different items are normally bought and sold as a 'set,' or a weighted average of the prices of a line of related products. Where differentials consist of percentage discounts or

rebates uniform for all commodities, comparisons of 'set' pricing or line pricing yield the same results, percentage-wise, as comparisons of the prices of individual commodities. Where price differentials on the [fol. 38] different members of a 'set' or line are not uniform percentage-wise, a weighted average produces results which may permit offsets of the individual item differentials."

Now, the position taken there, I take it, is a position with which you are completely in accord?

A. Yes, I am in accord with that position.

Q. Now, turning to the next page, Page 9, under the letter C, the second paragraph:

"In view of the Plus-or-Minus leeway which must be granted to all cost figures, as discussed later (Section III, A, 1), 'due allowance' should not be construed in every case to require full and complete cost justification of a price differential. It should be construed flexibly, so as to require only 'reasonable allowance' for cost differences based on sound accounting and pricing principles. For this reason the Committee [fol. 39] approves the position taken by the Commission in applying a 'de minimis' concept to cases where price differentials are not shown to be completely cost-justified but where circumstances minimize such failure to the extent that no corrective action is deemed necessary. In considering the applicability of the 'de minimis' concept, a primary test to be applied is the relation of the unjustified portion to the differential itself, not to the higher unit price."

I take it you are also in accord with the position there?

A. Yes, I am.

Q. Now, the third paragraph in the next section which reads as follows:

"There are many 'differing methods or quantities' which may give rise to cost differences between customers or classes of customers. Such 'differing methods or quantities' are generally ascertainable upon analysis of a seller's manufacturing and distribu-

tion system. Such analysis should interpret the terms [fol. 40] in their broadest connotation, giving full effect to all items of cost difference. The term 'resulting from' also should be given the same broad interpretation."

Again I take it you are in agreement with that position.

A. Yes.

Q. Now, on page 10 of the report, the first numbered paragraph headed "the nature of cost accounting":——

"Cost accounting is not and can never become an exact science because of the inherent element of judgment. Despite the description of uniform and detailed cost accounting procedures, two equally competent cost accountants may obtain different results from the same data. For this reason all cost accounting and cost analysis results should be accepted as reasonable approaches to accuracy, and not as precise measurements. The fact that unit costs are frequently stated in mathematical terms, after elaborate and painstaking calculations, gives them an aura of precision that is not warranted. With a few exceptions every unit cost and every cost difference is subject to some plus or minus allowance. This fact is universally [fol. 41] recognized for managerial purposes and should be for purposes of the Robinson-Patman Act. Most of the difficulties of proof stem from the fact that cost differences at best include elements of opinion and approximation."

I take it again that you are in accord with the position there taken and that expresses your view.

A. Yes, it does.

Q. On the next page, page 11, a paragraph headed "'Good faith' cost studies."

"Great weight should be given to cost studies made in good faith and in accordance with acceptable accounting doctrines. 'Great weight' should be interpreted as meaning that accounting principles relied on by a respondent should have an evidentiary value superior to an adverse theory of accounting unless the

adverse theory is supported by a preponderance of evidence that the principles relied on by the respondent are not found. A mere showing that a method other than that used by the respondent would produce narrower cost differences should not serve to overthrow an equally acceptable method used by the respondent."

[fol. 42] You are in accord with that position, and that expresses your point of view?

A. Yes.

[fol. 43] Q. Turning down to Page 11, Paragraph 5, I call to your attention the second sentence:

"Admissibility of pertinent costs information should not be prejudiced because it comes from sources not under continuous accounting control, such as special time studies, market surveys, estimates and opinions of qualified experts and production and marketing functions."

I take it again that expresses your point of view?

A. Yes, that does; yes, indeed.

Q. In the next paragraph I call your attention to the first dull paragraph:

"Classification or grouping of customers' orders, commodities and transactions has reputedly been recognized by the Federal Trade Commission as the model business practice. What this means is it is not necessary to cost justify each sale transaction or sales to each individual customer. This is important for cost justification purposes since no transaction or custom could be treated as a member of a class or [fol. 44] group. The cost of making each individual sale would have to be ascertained. Such refinement would be outside of the realm of practicability and would tend to make price uniformity a necessity regardless of the economies of manufacture, sale or delivery in dealing with certain customers."

I take it that expresses your point of view?

A. Yes, it does.

Q. I call your attention next to Page 13 of Taggart Exhibit 1.

The last paragraph on the page, the first sentence:

> "The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to straight-jacket cost justification would be self-defeating."

I take it again that certainly expresses your point of view?

A. Yes, it does.

Q. Now, turning over to Page 15 I find under italicized (d):

> "Direct and indirect costs,"

[fol. 45] a definition distinguishing between direct on the one hand and join or indirect costs on the other. It reads:

> "Costs separately incurred for any given product, customer or group of customers are readily assigned. These are direct costs. On the other hand, indirect costs, which are jointly incurred for two or more products, customers, or groups of customers must be allocated before total costs for any given category can be ascertained."

Again, I take it that that definition expresses you opinion as to a proper classification of costs?

A. Yes.

Q. I call to your attention on Page 16 a section with an italicized (g): "Method of determining most applicable methods of determination of direct costs or of apportionment of indirect cost."

I will not take the time to read that into the record, but I take it that the material expressed under 1, 2 and 3, the sense of that paragraph also expresses your point of view? [fol. 46] A. Yes, it does.

Q. Now, the Committee also provided that in their report, an appendix, and I take it that you are also in agreement generally with the suggestions and decisions given in this appendix?

A. Yes. I might say they are illustrative but not exhaustive. They are in response to what seems to be a demand for some general guidance in that direction.

Q. May I call to your attention on Page 25, in the first paragraph under (b) the fourth sentence, for the sake of arriving at a definition which might have some bearing upon the text of your testimony, reads as follows:

> "A distribution function may be defined as an operational activity at the lowest practical level of supervision for which costs can be isolated and collected."

A. Yes.

Q. That is a definition which is consistent with what you have been saying in your testimony?

A. I think it is.

Q. Now, dropping down to the paragraph after some numbered sub-paragraphs, I call your attention to the following text:

> [fol. 47] "Since methods of organization and operation differ among companies and industries distribution of cost functions also differ. The example of a definition given below therefore must be understood as being purely illustrative and not to be exhaustive or conclusive or such as would fit any specific company."

I take it again that in referring to both the analysis or definition of functions and of the service units which might be used to allocate those functions, that those particular two sentences express the point of view that you hold?

A. Yes, it does. They do.

Q. Now, I take it also that on Page 26 where certain illustrative functions are defined in some detail that you are in general agreement with those as illustrative definitions and descriptions of functions?

A. I have not read this page recently but as I recall I have no exception to it.

Q. It speaks of such things as advertising function, sales promotion functions, selling functions, warehousing, operating service functions, sales accounting and credit function, sales management, all of possible function [fol. 48] divisions of the distribution business?

A. That is right.

Q. And the definitions there are in your opinion accurate?

A. Yes.

Q. As far as they are illustrative?

A. I have no exception to make.

Q. Now, I call to your attention on Page 27 the first full paragraph there:

> "After ascertaining the direct costs it remains to assign the indirect costs. These costs are collected as totals of functions not chargeable directly. Assignment of these indirect costs is done by measuring the activity or output of the function in terms of units of functional service which can be counted or measured, and then applying to each business segment the amount of functional cost which is in proportion to the use or responsibility for the units of functional service."

Then there is an illustration in the next paragraph which I should also like to read:

> "A simple example makes this process clear. If the [fol. 49] function is personal selling, one possible unit of functional service in a customer analysis may be sales calls. If customers are divided into classes A, B, and C, and if ten per cent of the calls are made on Class A, 30 per cent on Class B, and 60 per cent on Class C customers, then the three classes share the cost of personal selling in those proportions."

Now, the principles illustrated or set forth in the first paragraph and illustrated by an example in the second are principles with which you are in accord, as far as your present use?

A. Yes.

Q. Now, dropping down to the bottom of the page, I call to your attention the last paragraph, part of it:

> "At the outset caution should be exercised with respect to overemphasis on the distinction between direct and indirect costs. This distinction should not be made for minor items of cost or for those where

treatment of potentially direct items by a satisfactory [fol. 50] application of the indirect procedure will produce completely reliable results. Substantial elements of direct cost are ordinarily so designated and recorded in the original bookkeeping process. Establishment and maintenance of the necessary bookkeeping routine for isolating all direct costs is burdensome and is justified only when amounts involved are appreciable and satisfactory results cannot be obtained by other and less expensive methods. In many cases the indirect functional approach, using an uncontroversial unit of functional service will produce acceptable results."

Now, as to the method of procedure, that again accords with your concept of what is proper?

A. Yes, it does.

[fol. 51] Now again on page 28, I call your attention the following passage, in the next paragraph:

"Functions vary widely in their closeness to the business segment being costed. Some such relationships are very close and the approximate measuring factor (the service unit) is easily identified and perhaps easily counted in total and in relation to the segments. The relationships of other functions to the costing segments are more remote, and the choice of a service unit which will adequately measure a given relationship is of greater difficulty. In many cases more than one service unit might be chosen. The precise choice will depend on two main considerations: (1) Which service unit most closely approximates a satisfactory measure of benefit or activity in terms of rational analysis; (2) Which service unit can most readily and economically be counted both in total and in terms of the costing segment. Different service units will yield different dollars-and-cents results, and a particular service unit should not be chosen merely [fol. 52] because it maximizes cost differences. Where the choice is otherwise a matter of a difference, however, there could be no objection to the choice of the method which produces the most desirable result."

Now that general statement there again I take it is in accord with what, with the opinions you have expressed in the draft order?

A. Yes, it is.

Q. Now, I call your attention at the bottom of the page again the word "transportation" in a list of a number of functions which more or less are in agreement with the definitions appearing on page 26 and a number of suggestions are possible service units used in allocating those expenses.

A. Yes.

Q. I take it that you regard the service unit there set forth as illustrative of possible units to be used in connection with the functional costs that are described?

A. Yes, with emphasis upon the illustrative nature. The list isn't, by any means, complete nor does it prevent the use of others where they seem appropriate.

Q. In other words, the choice of the measure to be used depends upon the facts and circumstances of the individual [fol. 53] case?

A. Very much so.

Q. And if the facts there set forth, the facts themselves more or less indicate which is the proper service unit in most cases?

A. That is right in most cases.

Q. Now, Mr. Sawyer, you were the author a few years ago of an article that appeared in the Iowa Law Review, Volume 36, entitled "Accounting on Statistical Proof in Price Discrimination cases", were you not?

A. That is right.

Q. Beginning at page 244 of that volume?

A. Yes.

Q. Now, in the course of that discussion you made the following comment upon the phrase "Due Allowance".

> "The Congress might have used the words 'not to exceed differences in cost', etc., but had it done so, there would have been a strong implication that it contemplated an exacting cost accounting standard. The words 'Due Allowance' seem to anticipate the necessity of wider tolerance and reasonable approximation. The language used certainly gives to the Court a sound basis for the recognition of the many

practical difficulties in this field of cost work. These [fol. 54] difficulties would tend to make exactitudes and precisions impractical, and defeats the main purpose of the Act in justifying good faith and avoiding unfairness."

Now I take it what you said there still represents your considered opinion?

A. It does.

[fol. 55] Mr. Long: What is the year of that, Mr. Ball?

Mr. Hart: '51.

Mr. Ball: Yes, 1951.

By Mr. Ball:

Q. Now, in the same article on Page 247, you say, distinguishing cost analysis from profit accounting:

A. Yes.

Q. (Reading):

"Cost analysis, on the other hand, involves the process of segregating one part of the total operation from the whole and calculating a value or cost of it alone. Here, we are not concerned with mathematical balance. Our problem is one of evaluation. The sole reliance is not regular books of account, although a portion of such data may be utilized. Much of the results of cost analysis must rest upon special studies, calculations and estimates to be judged by some standard of fairness that is consistent with the purpose of the analysis."

That expresses your point of view?

[fol. 56] A. Yes.

Q. And I take it that is the principle that applies to all costs analyses for whatever managerial or legal purposes it may be especially prepared?

A. Yes, I think that is now.

Q. Now, on Page 248 of the same article you said:

"In determining production costs, there are a number of recognized procedures which simplify the problem of proof. There are few such procedures in

the field of distribution costs. Unhappily, it is in the area of distribution that the great hope of cost justification generally arises in price discrimination cases."

That distinction between the problems in manufacturing costs and distribution costs is one which I think you consistently recognize and emphasized and is still your point of view, is it not?

A. Yes, it is.

Q. Now, on Page 249 of this same article you made this statement:

"In attempts to delineate cost differentials which are believed to exist between two different methods of [fol. 57] manufacture, sale or delivery resulting from the differing methods or quantities in which a given product is sold or delivered, it is necessary first to isolate elements of cost for the one product from any other element of cost with which it may be related. Inasmuch as a company seldom markets just one product or just one service, there are bound to be many elements of cost which must be shared. Rent and maintenance of plant and machinery is a well-understood example. Even the raw material itself may involve a division of costs as between more than one product—waste or left-over of one product becoming the principal ingredient of another. Such situations are referred to as 'join costs.' Because they necessarily involve arbitrary 'allocations' to particular products there is room for much argument as to the proper division to be applied to the product under study, as against all others which jointly bear the [fol. 58] total cost of that element."

Now, that expresses a distinction, I believe, what you might call joint or indirect costs on the one hand and direct costs which represent your considered opinion of the importance of the distinction?

A. Yes.

[fol. 59] Q. And where you say one product that would be equally true if you substituted a set of products which are sold on the common pricing basis?

A. Yes, that is true.

Q. Now, I call your attention that on page 256 of the same article you had reference to the Bird & Son case.

A. Yes.

Q. And you referred to the fact that in that case a cost study was made which put in one class mail order houses, a single customer, Montgomery Ward Company.

A. Yes.

Q. And a study of the cost of distribution to that customer as against all of the independent retailers considered as a group?

A. Yes.

Q. Then you made this comment—incidentally, you did approve of the result reached in that case?

A. Yes, I did approve.

Q. Of the methods employed?

A. Yes.

> *Q.* "While few cases are as simple as this, it serves to illustrate the basic approach to such a problem. The reasonableness of the relationship between the [fol. 60] particular method of 'spreading' expense between various customer classes of products will vary from case to case so that too much importance should not be attached to the fact that these particular methods were accepted in this instance. Each situation must be judged upon its own merit and that is where the skill and good judgment of the accountant must come into play."

Q. Now, that again states a general position that you have consistently, Mr. Sawyer, held?

A. That is true.

Q. Every case has to turn upon the fact that shows the rational connection between the service unit chosen for purposes of allocation and the economic facts connected with the functional cost to be allocated?

A. Yes, that is true.

Q. Now, you also, I think, have distinguished among indirect costs certain that are more distant related than others to the problem such as general overhead costs, and I call your attention on page 255 of this article:

> "In all likelihood, the truly indirect distribution costs, such as sales management and office expense,

[fol. 61] will offer the greatest resistance to attempts to work them into proof of savable cost in the justification of quantity purchases. It is here that the far-sighted cost man will move with greatest caution, still I have a controversial nature of cost methods employed and the present inadequacy of available data." That expresses your present point of view?

A. Yes.

Q. That it is very difficult to say with dogmatic certainty that overhead costs should be allocated on one or another segment?

A. This is an area where dogmatic statements are dangerous.

(A recess taken.)

By Mr. Ball:

Q. Mr. Sawyer, you appeared before the Anti-Trust Law Section of the Illinois Bar Association together with Professor Taggart, I believe, sometime in '56, well, in '55 and you gave a talk on cost justification of quantity differentials which appeared in the Anti-Trust Bulletin of January 19, 1956.

A. Yes, I recall that.

Q. And it appeared beginning at page 573 of that pub-[fol. 62] lication. I call attention to a passage of what you said at that time which appears under page 579 of the Anti-Trust Bulletin which reads as follows:

"In all but the simplest cases the reliability of the evidence must be tested not against the accuracy and completeness of the data presented and more largely upon the soundness and numerous objective judgments of the witness as to the methods of allocation of various types of expenses common to several classes of products or classes of customers. These the accountants refer to as 'joint costs'. To segregate or allocate such costs to particular products or particular classes of customers requires the exercise of an informed judgment. There is usually a choice of alternative methods. Objective tests such as time and motion study of representative samples may fortify a par-

ticular selection. In many cases, however, such objective tests are impractical or unavailable within the reasonable bounds of time and cost. Reliance is then placed upon the judgment of the person directing the study."

Now, the point of view that you expressed there re-
[fol. 63] mains your point of view? Does it not?

A. Yes.

[fol. 64] Q. Now, in as early as 1938 you were quite interested in this subject, Mr. Sawyer, I recall, and you wrote an article entitled "Cost Accounting as Evidence in Cases Arising under the Robinson-Patman Act," which appeared in the National Association of Cost Accountants Bulletin No. 19, February 15, 1938.

A. Yes.

Q. Now, in that article you made the statement—that article appeared somewhere around Page 690 and thereafter—you made these statements:

"The most common device for this purpose is the quantity discount applied to each commodity. But as applied to a varied line of resale merchandise it is not easy to allocate cost savings to specific commodities.

"Especially is this true when the solicitation costs are analyzed. The selling is spread over the entire line, and is not centered upon individual items. The salesman makes regular calls upon his wholesaler and retailer customers for the purpose of replenishing their stocks.

"His calls are in the nature of service calls, and the [fol. 65] dealer depends very largely upon him to maintain his stock. Under these circumstances, there is likely to be less correlation between potential volume of business of the customer and the sales effort expended thereon.

"The number of items carried is a larger factor than the amount of each item purchased."

Now, that expresses your point of view?

A. Yes, I was thinking of that particular type of distribution problem.

Q. Well, I take it when we talk of any problem we are assuming a set of facts that make the comments that I quote from you relevant?

A. Yes.

Q. Now, in the same article you made this statement:

"It is not uncommon for such resale lines to contain hundreds or perhaps thousands of items, each distinctly separate commodities, but, nevertheless, inseparably priced in a common selling effort.

[fol. 66] "There are genuine difficulties in approaching the job of allocating solicitation costs to individual items in such a case. Under some circumstances, it may be possible to establish a pattern of sales performance as among the several items; that is, the sale of one hundred units of one commodity may be likely to indicate the sale of ten items of another commodity, and so on, through the list.

"If such a pattern emerges, it may form the basis for an expense allocation by individual commodities but more frequently such a pattern is not sufficiently distinct for such a purpose, and this approach, therefore, is not usually available.

"Furthermore, this type of selling develops a high correlation between the number of sales and calls and the number of orders. Mail orders from regular dealers tend to be a minor value factor, the bulk of the sales centering around the salesman's regular visits.

[fol. 67] "Therefore, the cost of selling a given account tends to be measured by the frequency of the salesman's calls."

Now, that assuming the facts described there, expresses in general your philosopy and point of view?

A. Yes, I think so.

Q. Again in the same article you said this:

"In approaching an analysis of solicitation cost savings, it is important to recognize that:

(a) The resale item salesman presents and sells a line of goods rather than an individual commodity;

(b) Presenting and selling (or presenting and not selling) any item is made possible only by the fact that many other items are carried;

(c) Many items are carried only to complete the line. Expenses of presentation must be borne by items when sold rather than when presented.

(d) It is impossible and impractical to measure the actual time spent on each commodity, and to [fol. 68] determine whether the commodity itself was the cause of the expense, or whether it was introductory to other items."

That illustrates an inter-relationship between commodities which expresses your general philosophy in this matter?

A. Yes.

Q. Now, you also made a talk which appears in the Year Book from the year 1938 of the National Association of Cost Accountants entitled the "Control of Distribution Costs"?

A. That is correct.

Q. Beginning at Page 189 of that Year Book. Now, I call your attention—and I think we can save time by calling your attention generally to a heading, a devision of that talk, which appears on Pages 190 up to the top of 199 and headed "The Problem of Distribution Cost Control," in which you spoke of the great difficulties of making a scientific or an intelligent analysis of distribution costs, and I take it again, with the qualification that some years have gone by and some techniques have been refined, that [fol. 69] in general that still represents your point of view?

A. Yes. I think we have to recognize that in the almost twenty years that have elapsed since this was spoken, great strides have been made in this area. It has been forced upon the attention of the accountants in every line of industry and in every phase of distribution.

I think we are much better off today than we were then.

Q. Yes; but, the problem is still one of a management control which is based upon more and more information upon distribution costs?

A. Yes, that is true.

Q. Well, on Page 192 of the same paper you said:

"In addition to the direct elements, there is a highly important group of supplemental elements:

(2) The maintenance of a balanced relationship between the individuals concerned and the trade or industry of which it is a part;

(3) The recognition of the public interest in the particular business venture:

[fol. 70] (a) As it is encouraged by advertising and other forms of sales promotion;

(b) As that interest is defined by law (Robinson-Patman Act, Anti-Trust laws, Food and Drug Acts, etcetera).

(4) Interrelated problems of price determination.

"These elements of the general control task, although collateral, are fundamental and likewise require a technique of measurement and appraisal, thus calling once again upon the skill and ingenuity of the cost man."

Now, I take it that in stating that you were recognizing the fact that the controller or analyst in the business had a need of ascertaining facts about distribution and administrative costs for a multiplicity of management and business purposes that are interrelated?

A. That is true, yes.

Q. And it is a matter of fact, is it not, that the studies that are made of distribution costs very often serve more [fol. 71] than one single purpose?

A. Yes, that is right, surely.

Q. And that there is hardly any study intelligently of the differential costs of a method of distribution or the handling of a class of customers or different commodities that do not have a potential reflection in management decisions?

A. That is correct.

Q. Now, you also made a talk to the Baltimore Chapter of the National Association of Cost Accountants, which appeared in the NACA Bulletin, February 15, 1938, at Page 681:

"Cost accounting is evidenced under cases arising from the Robinson-Patman Act."

from which you quoted in your same talk appearing in the Year Book of 1938, I believe, and in that talk at Baltimore repeated at Page 696 of the NACA Bulletin, repeated at Page 210 of the Year Book, you said this:

> "—essentially is a new field, and those who undertake work of this character must do so in the spirit of the pioneer. If approached in this spirit, the task will reveal itself as one that is not confined to compliance of the Robinson-Patman Act."
> [fol. 72] "The results achieved by clear-headed cost work in the field of solicitation in order handling cost may be as far reaching in their effect upon future merchandising policies as was the work of the cost accountant a generation ago in charting the course of production efficiency.
> "It may well be that the stimulus supplied by the interest in this Act may bring to the attention of management aspects of selling and handling costs which reveal the need for a substantial adjustment of distribution policies regardless of the terms of the Act itself."

A. That is correct, yes.

Q. And your experience has borne out the type of studies that are made for the purposes of Robinson-Patman Act do have and have had a very real influence on management selling and pricing policies?

A. Yes, I believe they have.

Q. Now, let us turn back to the draft of the pre-trial order, and I want to call your attention on Page 17 in Paragraph A, and I want to ask you whether—I hope you will appreciate the spirit in which I am asking the [fol. 73] question, whether what you say there is anything more than a lawyer's comment upon the purpose and meaning of the Robinson-Patman Act, and does it involve anything that is particularly expertized within the field of the accountant?

Mr. Hart: What is this reference?

Mr. Ball: It is subparagraph (a) beginning at the bottom of Page 17.

Mr. Jinkinson: Paragraph 12.

Mr. Ball: Yes, of Paragraph 12.

By the Witness:

A. I believe it goes a little further than what you suggest.

By Mr. Ball:

Q. Well, that is what I would like to separate from that, what it is you feel goes beyond the comment or the opinion expressed upon the purport and meaning of the Act.

A. I think I am trying here to set forth the frame of reference within which the accountant must work.

Q. And that frame of reference is dictated by your analysis of the meaning, bearing and purport of the Act itself?

[fol. 74] A. Yes, as it has been clarified by the Commission and the Courts.

Q. Putting it another way, what you are doing here is stating what you as a lawyer would summarize the frame of reference with which the accountant that you were employing to handle a particular case should work, is that correct?

A. Well, I would have to use much the same language even if I was wearing my accountant's wig, I think, in trying to define the outlines of a study.

Q. In other words, all we are saying here is that the study has to be within the confines of your understanding of the statute?

A. That is correct.

Q. Now, turning to Paragraph B, subparagraph B, on Page 18, you speak of Robinson-Patman accounting in parentheses. I take it you do not mean that what you call Robinson-Patman accounting involves any tests or techniques which do not have their utility from management purposes?

A. No. This is a phrase that developed in the course of the Committee's deliberation leading up to the publication of this report, and we wanted to eradicate certain misconceptions of Robinson-Patman accounting, as distin-[fol. 75] guished from ordinary everyday record keeping in business.

Q. Well, were you or does this imply anything more than this, Mr. Sawyer, that in preparing a cost defense

in a Robinson-Patman Act case you cannot rely upon the day-by-day accounting records kept in the ordinary course of business, but must go beyond that into special studies and analyses?

A. Yes.

[fol. 76] Q. It is also true that those same types of special studies and analyses equally serve management purposes and are often required to aid management decisions?

A. They may also serve management purposes, yes.

Q. And, in fact, the same type of studies often do lead to management determination of policies?

A. Yes, in setting up a management study, however, you may wish to bring in matters not relevant to a Robinson-Patman situation.

Q. But there is hardly anything relevant to a Robinson-Patman Act question that does not have some bearing upon a management problem?

A. I am inclined to think you are correct.

Q. Now, in one of your articles you made reference to the fact that ordinarily perhaps the ideal way to present a cost defense would be by stipulation, but that that was rarely stipulated?

A. I believe I was rash enough to make that suggestion.

Q. And then you commented that in the absence of the stipulation method ordinarily you had to put in the accountant to state his conclusory results and explain the methods by which he arrived at that?

A. Right, yes.

[fol. 77] Q. Now, you understand, do you not, in this particular case we have one of those rare situation where the entire data upon which the defendant is relying has been offered for stipulation, and that substantially has been stipulated?

A. I understood that.

Q. And you understood, did you not, that the basic data—I am speaking now of specifically the Borden order, that the basic data consisting of the original memoranda made by the time-study people and the summarizations that were made from those have been identified as group exhibits and made available to the inspection of the Government?

A. Yes.

Q. And you did understand, did you not, that the Borden order does not attempt to state conclusions at any point, but merely provided data and some computations on that data that were made in some cases upon certain methods of allocation?

A. Yes.

Q. And that the Borden order itself does not at any place state a conclusion or express a final opinion as to what the difference, justifiable or not, might be?

[fol. 78] Mr. Jinkinson: I am going to object to that question. It is assuming a state of facts not disclosed by the record. Mr. Ball says they do not state any conclusions, but I do not know whether they do or not.

Mr. Ball: Well, I am asking for the witness' understanding of whether that was his understanding from the data.

By the Witness:

A. I do not recall reading a conclusion stated as such. I think you can infer conclusions from it.

By Mr. Ball:

Q. Now, it is your opinion, is it not, that one of the ways of establishing the reasonableness of a cost justification is by testing an allocation by the use of perhaps one or two or more alternative service units as the measure of allocation?

A. I am not entirely certain I am clear as to your question.

Q. All right, put it this way: Let us assume that we have a functional cost ascertained.

A. Yes.

Q. That is, in the nature of a joint or indirect cost.

[fol. 79] A. Yes.

Q. Let us assume also that there may be a choice between more than one service unit to be used as the factor in determining the allocation of the functional cost.

A. Yes.

Q. I think you have stated on numerous occasions that the ability of making more than one computation from the data using different service units strengthens the valid-

ity of an overall judgment to be derived from the results of any one of them?

A. Certainly if there are alternative methods of calculation available, exploration of those would seem intended in my judgment to strengthen it.

Q. And, in fact, the ability to make those alternative measures of computation would of itself give a broader basis for judgment upon the validity of any conclusion to be drawn?

A. Yes, I think it would.

Q. Now, are you aware or was it your impression from the information which was submitted to you, that it was perfectly possible on the basis of the data submitted by the Borden Company to make alternative computations on various methods of allocation?

[fol. 80] A. I believe I noticed some points where there was a choice.

Q. Or, at least, where the data was available so that alternative methods could be chosen?

A. Could be used, yes.

Q. Now, I want to turn now to Page 18, Paragraph C, and I direct your particular attention to the first sentence:

> "Where alternative methods of allocation are available, the considerations which dictated the ultimate choice should be stated as part of the direct presentation of the justification."

Now, I ask you if that statement isn't made with particular reference to the kind of a defense that would be introduced by putting an expert witness on the stand to testify to a study he made and the conclusions he reached, rather than to one where no statement is made of an opinion but merely the mathematical facts and the basic facts are set forth?

A. I am not sure I can make that distinction. I do not believe that it is necessary to have a live witness on the stand to bring this into play. I think it is equally [fol. 81] applicable in stipulated material.

Q. Well, do you mean by that sentence, however, any more than that the relevant facts which bear upon the propriety of an allocation should be set forth?

A. Certainly not.

Q. And if that is done, doesn't that meet the point that you have in mind here?

A. There are various degrees of burden, shall I say, upon the proponent of one of these studies.

Q. Well now, may I interrupt? When you speak about burden, are you using this in the sense as a lawyer would use it of what you think the burden is of going ahead, or are we talking about expertizing an account?

A. Well, I am speaking in the sense of burden of proof.

Q. Which is more or less a legal concept?

A. Yes. The whole of that which makes for evidence of good faith in a presentation.

Q. Well, when you say here, "The considerations dictating ultimate choice of a method of allocation," you have in mind basically nothing more than the factual background which shows the lack or the presence of a rational connection between the service unit employed and the functional cost as the objective of the study?

[fol. 82] A. Yes. Let us not interpret that too narrowly. I have in mind this, that where you have a choice between using, we will say, a time measure as against some quantitative measure and one of those is strongly biased in favor of the contested discount, I think there is an added burden used in the legal sense.

Q. Well now, what do you mean by "strongly biased"? Do you mean merely because the result is more favorable, or do you mean that there is some element of irrationality about it?

A. Well, it may be a bit of both. Certainly, if it is favorable, one method is favorable and the other is not, it does not mean that the favorable method must of necessity be thrown out.

Q. Well, that is what I wanted to be sure of.

A. But I think you have got to state, and what I say here, "A part of the direct presentation," whether it is by stipulation or by oral testimony.

I think the proponent should bring out into the open the alternatives and provide his rationale for selecting the more favorable, if that is what it does.

Mr. Stevens: Just for the record, I would like to enter an objection here as to questioning Mr. Sawyer as to his

[fol. 83] legal opinion on these various subjects, and I move to strike all testimony which consists of his legal opinion on the ground it invades the province of the Court and is not competent evidence.

Mr. Ball: Well, may I state for the record that the reason I have been asking these questions is that in the order submitted, at least so far as the defendant Borden, I believe that of what the proposed testimony consists is in many, many instances nothing more than an ultimate opinion, 1, as to the effect of the Act, 2, as to the burden of proof, and 3, as to the evidentiary propriety, fourth, as to——

Mr. Jinkinson: Is this off the record?

Mr. Ball: Oh, no, this is on the record. I am laying the groundwork specifically, because I propose to object to a substantial number of these on the ground that it expresses an opinion.

I am not asking this with the idea of bringing forth or being bound by any expression on the law, but merely to [fol. 84] demonstrate that much of what is set forth in the direct testimony is subject to the objection of Mr. Jinkinson.

Mr. Jinkinson: Are you through?

Mr. Ball: Yes.

Mr. Jinkinson: Now, I move to strike all of the remarks of Mr. Ball on the ground it is, of course, cluttering the record with remarks about what he is attempting to do. What he is attempting to do ought to be apparent from the record.

I move to strike any statement of what he is attempting to do.

Mr. Long: Let me add to that that we consider this is proper in testimony by an expert here, and that wherever there is—there may be some commingling with legal problems, that they are necessary ones in this particular cost accounting field.

Now, I wonder if this wouldn't be a good time to take a little recess.

(A recess taken.)

[fol. 85] By Mr. Ball:

Q. Now, turn over to the top of Page 19 and look at the last sentence in Section C:

> "Experience has dictated that so-called normal and accepted accounting practices used for management purposes or other general everyday purposes are not necessarily applicable to the purposes dictated for the Robinson-Patman Act——"

Now, applying that sentence specifically to the Borden order, where does it apply or have any relevance at all to the Borden study as you saw it?

A. Well, I do not think it has any special relevance to that.

Q. What you were talking about here is general compliance, but it does not necessarily imply to any point in Paragraph C any criticism of the Borden study?

A. No; I am laying down here the foundations for accounting procedure. It may or may not.

Q. Well, offhand, I would like to have you look at all of your Paragraph C and ask you if there is anything in that paragraph which you intended to represent as a criticism of the cross study on behalf of Borden Company?

A. I think it has this relevance. There are some [fol. 86] alternatives which I felt in my review of the data had not been sufficiently explored.

Q. Well now, name one of those?

A. I think one had to do with the transportation, the allocation of the time of certain classifications of truck drivers.

Q. All right. Now, the time spent by the truck drivers to and from the routes——

A. Yes.

Q. (Continuing) and the time spent between stops were exactly computed in that case, were they not?

A. I think they were.

Q. And set forth in the study?

A. Yes.

Q. The number of stops made were also set forth in the study?

A. Yes.

Q. The sales by classes of customer were also set forth?

A. Yes.

Q. The time spent at these various stops themselves were also set forth in the order?

A. Yes.

Q. Now, with that basic data it becomes a matter of [fol. 87] mathematical computation whichever one of the four possible units were selected, is that correct?

A. Yes, I believe that is correct.

Q. So there is no exclusion of any particular method in the data set forth in the pre-trial order, is there?

A. No. I believe the facts were there for the computations to have been made.

Q. Well, was it your understanding that the order went beyond, or the draft of the order went beyond the presentation of the facts?

A. No. It was my understanding that there had been a choice, or, rather, a failure to recognize the services performed.

Q. Well, wherein laid the failure so long as those facts were set forth?

A. Well, I believe that the choice there should be at some point if you are going to add up the alleged savings that have been proved.

Q. But that was not done in any of the data that was submitted to you?

A. No, it was not.

Q. And the basic data was there by which any number of methods could have been employed?

A. Yes; well, I am pointing out here what I consider the [fol. 88] principles to be applied in that operation.

Q. Well now, if you implied criticism here you were assuming, were you not, that we were going to use a particular method rather than some other method of allocation?

A. Well, from the data I reviewed, it seemed to me that it was the intention to utilize the time factor alone.

Q. Well, do you recall what the specific item of data was that gave you that impression?

A. No, I do not, because I was not reviewing this with a view to detail as if I was actually performing the study myself. I was looking at the principles that had been applied and I was calling attention here to the necessity at

that particular point of giving full place to both alternatives.

Q. But if the basic data that I have described was set forth, that is, the time of each one of the operations, the time spent in the store as well as going to and from the stores, and to the route, the number of stops, the sales per customer, all the data was provided for which any one of the several alternatives could be computed as a pure mathematical matter, is that correct?

A. I presume that is true.

[fol. 89] Q. Well then, in what way was there any deficiency of the study?

A. Well, I saw no aggregations of these savings, and I am pointing out here the necessity in final appraisal of your cost justification of taking that into consideration.

Q. Well now, you see what I have asked you is this: Looking at Paragraph C, upon what basis do you imply in Paragraph C a criticism of what the material was that was before you?

Really, isn't your criticism based upon an assumption of the manner which we expect to use that material?

A. Well, what I must assume must eventually emerge from a study of this kind.

Q. Well, are you criticizing what that is going to be when you figure what it is?

A. At this point I have not specifically criticized. I am pointing out what the principles are that should be employed.

Q. Well then, we come back to my original point, there is nothing in Subparagraph C that implies or involves a criticism of the data that was before you.

A. It is a statement of principles which should be [fol. 90] applied to all of these matters.

Q. Now, looking again at D on Page 19 isn't it also true that the Borden study did make a functional analysis of the cost of functions?

A. Yes; again, this is a statement of principle.

Q. Yes; and there is nothing in D that was intended to imply the criticism of the cost study as submitted to you?

A. No; where I have criticized I think I have indicated specifically that that is what I am doing.

Q. Now, turning to Subparagraph E, again you are stating principles rather than implying a criticism of what was submitted to you in the Borden cost study?

A. Yes. All of this is a statement of principles which I think are applicable to such study.

Q. Now, turning to the top of Page 20, you use or you make this statement:

> "The two main considerations in making this choice are rationality and practicality of the selection."

A. That is correct.

Q. Well, by rationality you mean what follows from the specific facts showing the economic connection between the functional cost and the object?

[fol. 91] A. Yes.

Q. And rationality is determined upon the facts of this specific case?

A. That is true.

Q. And there are no dogmas or *ob*absolutes that stand in the way of a conclusion to be reached from the study of the facts?

A. No. There must be complete flexibility.

Q. And basically that conclusion is one of common sense and appreciating the closeness or lack of closeness of the relationship of one service unit to another?

A. That is true.

Q. Again in Paragraph F you were stating general principles, were you not, rather than a criticism of the particular Borden order?

A. Yes. That is also true, I think, in G. Now, looking at the last sentence in F, do you know of any particular method of allocation implicit in the Borden study that contains a bias in the sense that you defined it sometime ago?

A. I believe later on I do point rather specifically.

Q. Well, you know of nothing there other than may be implicit in some other later paragraphs?

A. That is right.

[fol. 92] Q. Which we can touch upon when we get to that. Now, you make a statement here in G on Page 20 where you speak of allocation of internal costs among

various classes of products and classes of customers. Now, you were aware, were you not, that there was no attempt in the Borden study to make any allocation or even to provide the basis of allocation between classes of products, other than as there might be between the ice cream business and the fluid milk business separately managed out of the same central division?

A. I believe that is the only instance of that kind which could occur.

[fol. 93] Q. Other than that you did not mean to imply that there should be any further breakdown as to internal costs as to classes of products?

A. No, as I recall I took no exception to that.

Q. Now, turning to the last sentence in Paragraph 20, the test as to the acceptability of the allocations again ultimately depends upon the facts set forth in the record, isn't that correct?

A. That is true.

Q. Now, turning to Paragraph (h) on Page 21, you make a statement in the second sentence,

> "In the performance of this function the routeman is a truck driver and time devoted to the performance of this function should be allocated as an element of the transportation costs."

Now, the use of the word should trouble me, Mr. Sawyer, because I thought there were no dogmas of a particular method by which a matter should be treated. Did you really intend to use the word "should" as an absolute in this sense?

A. No, but it did seem to me from a reading of the material before me that this would have been the rational [fol. 94] decision.

Q. Now, there was nothing that required the taking of drivers' time to the route and the drivers' time between stops, and requiring you to lump that with the cost of the trucks in a total of transportation costs, was there?

A. No, I wouldn't think there was.

Q. Nor is there any necessary reason why the two items would have to be allocated on exactly the same basis?

A. I was thinking here more of segregating that element of the cost from this second function.

Q. Well, all you had reference to is that there should be a segregation, is that it?

A. Yes, that is true.

Q. Well, as a matter of fact, the time was carefully segregated in the Borden study, was it not?

A. I believe the raw material was there from which the segregation could be made.

Q. Do you recall there was a separate analysis and computation of the time of the driver from the plant to the route, and the time between stops on the route?

A. Yes.

[fol. 95] Q. And that would be the kind of segregation that you have in mind?

A. Yes.

Q. Well, then again, you are merely announcing that there should be that segregation which actually did take place in the Borden study, is that correct?

A. Yes, I think that is true.

Q. Now, the last sentence again: "Time devoted to these service activities should be accounted for as an element of customer service costs, and taken into account in the determination of the aforesaid transportation costs."

You mean by that that there should, again that there should be sufficient data to permit the segregation of those costs?

A. Yes, I think that is true.

Q. And your recollection is that the Borden order did contain that basic information?

A. I believe it did, although I don't remember all of these data.

Q. Well, you have no recollection to the contrary, at least?

A. No, I do not.

[fol. 96] Q. Now, turning to paragraph (i) I call your particular attention to the second full sentence, "If this is the case then weight or bulk, whichever has the direct effect upon the cost, should become a factor in the allocation."

Now, you did not mean by that that there were not other possible methods of allocation, did you?

A. No.

Q. And other methods might be equally or more rational depending upon the particular circumstances in the case.

A. Yes, I am not passing upon that.

Q. And you at no time have seen the full pretrial record setting forth all of the facts?

A. No, I don't think I have. The last sentence I think is an important sentence, "Customers taking heavy weight or large bulk should bear proportionately heavier costs than those who take less." That is a statement of a principle.

Q. Is that, however, an invariable principle in your opinion?

A. I think there could be very strong reasons for not following that.

Q. Yes, but if those reasons exist, that isn't a dogmatic [fol. 97] principle?

A. No, that is not. That is true in all of this, but I am just pointing out it would have to be a pretty strong reason.

Q. Now, let's take the situation here. Put it this way: Do you know the manner in which routes are planned in the milk industry?

A. I can't say that I know exactly how they are planned. I know generally of the problem of planning a salesman's routes, whether they be the ordinary type of salesmen or salesmen from a wagon.

Q. Well, now, you understand do you not, that these drivers in the milk industry, do not solicit business.

A. It was my understanding that solicitation was not entirely out of the question.

Q. Well, we will come to that a little later on, but you understood that they had no privilege of adding a new customer on the route, or did you understand that?

A. I don't believe that that was particularly pointed out, but they could influence what a customer——

Q. I am going to come to whether there was any basis for that assumption a little later, but did you understand, or do you have any knowledge as to whether or not the trucks run full or empty, whether the customers added to [fol. 98] a route depend upon volume or upon the time taken to serve the customers, or any of the other factors that enter into the composition of a route?

A. Well, I can see the existence of numerous factors there, the hours a day which the milk must possibly be

delivered, the balance as between salesmen, truck drivers——

Q. And limitation on hours in which the union contract will permit the driver to work?

A. And health requirements and things of that kind.

Q. And health requirements, and distance of a particular route from an initial plant.

A. So I recognize it as a complex problem setting up a route.

Q. And so the allocation would have to depend upon a rational conclusion to be drawn from all of those kind of factors.

A. That is correct, yes.

Q. And there would be no dogmatic one way or the other it had to be?

A. No.

Q. Turning to paragraph (j) on the top of page 22, again I take it that here you were announcing a principle rather [fol. 99] than making a criticism of the Borden report.

A. Yes, that is perfectly true.

Q. And it is true that the Borden report did have a time study reporting of the route man's time devoted to the various activities, as you suggest?

A. Yes.

Q. And as far as you recall, the grouping of the results of this study in customer discount classes observed the rule of adopting homogenous classes?

A. Well, I can't say I characterized in laying down a principle that should be applied here, but you must understand that to be able to say that this classification measured up to the standard, I would have had to spend very much more time with these data than I have.

Q. Well, at least then you do not express an opinion one way or the other on that?

A. That is right.

[fol. 100] Q. Now, in your next paragraph, paragraph (k) refers to central overhead, and you define it as including billing, credits, collection, general accounting, general administrative staff, and executives' time.

You recognize in the third paragraph there that many of the costs involved in this heading may readily be classified as of proportionate application to all discount

classes, and therefore, outside of the scope of justification study.

That is a proper way of making a study?

A. Yes, that's right.

Q. And you can state that in another way, can't you, Mr. Sawyer, that if you understand that X dollars are involved here, and you do not make any special allocation of it, the effect is exactly the same as if they were allocated on a dollar of gross sales basis.

A. Yes, that is true.

Q. Now, I call your attention to your sentence, "It is incumbent upon the proponent of a cost justification to ascertain if there are indirect costs among the general overhead accounts."

Do you know whether or not that effort was made in the Borden study, or again is this a statement of principle?

[fol. 101] A. That is a statement of principle.

Q. Rather than a specific criticism?

A. Yes.

Q. Now I am looking at the rest of the paragraph—well, all of what you say, practically, on page 23 down to the last sentence that begins at the bottom of the page—you are speaking here, basing an opinion, upon matters that you obtained in your professional experience as a lawyer, is that correct?

A. No, no.

Q. When you say here, "In his professional capacity as adviser," were you a lawyer or an accountant in that capacity?

A. I am an accountant in that capacity. I might say for the record, to explain that point, I have been called in many times by corporations to review their discount structures, and to advise on studies which might be made to justify—these are cases which are not in litigation, cases where companies wished to have the satisfaction of knowing what their status is prior to any litigation or the possibility of it. And in that capacity I regard myself as a consultant. Usually I am retained by the corporation counsel, and in conjunction with whatever management or accounting [fol. 102] personnel might be involved.

Q. Yes, but as a consultant you are really a hydra headed

individual in a sense that you are both a lawyer and an accountant.

A. I have had a total experience in this area, and I am giving my client the benefit of that experience.

Q. And the fact is that in connection with that you would, if the question came up as to the matter of the information you acquired or the opinions you expressed, you would have no hesitation in claiming the privilege as advice of lawyer and client.

A. I think it is on that basis because, as I say, I am working with the lawyer for the corporation.

Q. Now, what you say on page 23 about what has happened in other corporations in your experience, does that mean that that necessarily occurred in some other corporation, does it?

A. No.

Q. And you have no facts that would indicate that the matters that you state, that you found in other corporations to be true, necessarily would be true in the Borden Company?

A. No, I haven't.

Q. Now, at the bottom of page 23 you say, "In Borden's [fol. 103] cost study, no attempt was made to allocate central office expenses as between chains and independent stores although the defendant conceded that the getting and holding of chain store business was the function of account management."

From what document did you gather that impression, and can you point to any aspect or anything in the papers presented to you that supports that?

A. I believe that I gathered that from the Malone deposition.

Q. Well, you were aware, were you not, that the so-called brochure that was in front of you contained an allocation of the substantial amount of central office expenses based on time studies?

A. Well, I was speaking here more of the——

Mr. Long: Don't continually misstate the record on that, Mr. Ball. Put it in general terms, and not put it like that.

Mr. Ball: Would you read the question and ask the witness whether he could answer it?

Mr. Long: I object to the question on the basis of a misstatement of the record.

(Question read.)

[fol. 104] By the Witness:

A. Well, that may have been. I don't recall definitely. That is not what I was referring to here.

By Mr. Ball:

Q. Well, what were you referring to?

A. The executive time.

[fol. 105] Q. Well, now, you understand that I am looking on page 22, where you referred to central overhead or general office expense and state that you will include billing, credits and collection, general accounting and general administrative staff and executives' time.

Do you mean now that you do not include all of those in the reference on top of page 24?

A. I am referring particularly to what was said in, I believe it was in the Malone deposition with respect to such expenses.

Q. Well now what are the expenses you have in mind? Do we mean billing? What I am trying to say is do you mean billing, credits, collection, general accounting, and general administrative staff, by "central office expenses"?

A. Well, I mean whatever Mr. Malone was referring to in something that he said.

Q. Will you read what he said?

A. This is page 84, paragraph marked "150MD".

Mr. Long: That is the Borden defensive pretrial order.

The Witness: Yes.

By the Witness:

A. (Reading) "No time studies were made of the time of the executive and administrative employees in contacting [fol. 106] the executive officers and other representatives of the chain stores. It would have been possible to have had such executives and administrative officers record time spent in telephone calls and personal contacts with chain

stores and independents. However, in the opinion of Mr. Malone, during the limited period of time covered by the survey, activities of such a type could be disproportionate to what actually takes place over the regular course of business during longer periods of time. A study lasting as long as a year would probably average out such inconsistencies."

And I think he goes on further in these other paragraphs.

Mr. Long: That is the Borden defensive pre-trial order as entered in this case.

Mr. Ball: What paragraph were you referring to?

Mr. Long: You started at 149, didn't you, Mr. Sawyer, and you were reading through?

The Witness: Yes.

Mr. Ball: I thought this was the brochure that you were handing me.

[fol. 107] Mr. Long: No, this was the deposition, a paragraph submitted by the Borden Company there.

By Mr. Ball:

Q. Well, then, to clarify this at the top of page 24, where you speak of "central office expenses", you mean all of the expense of the executive and administrative officers described in paragraphs 149MD and 150MD of the Malone deposition?

A. Yes, I was directing my remarks particularly to those. I am not sure that I knew exactly how far you had gone with some of those other expenses.

Q. And with reference to what is said on page 22 with respect to billing, credits, collection, general accounting and general administrative staff, as part of general office expense, you did not intend to infer that no distribution or time studies had been made of that expense?

A. It seems to me I read something that made some reference to that, that indicated to me that it had not received perhaps all of the attention—I may be wrong in my recollection of all of this material.

Mr. Long: I think that is state of the record that should be clarified, if you can, there.

[fol. 108] By Mr. Ball:

Q. I was going to ask you to read beginning there at page 152, paragraph 244, and now I ask you if that doesn't correct the impression that you stated.

A. Is that in this volume I have before me?

Q. Yes, the one you have.

A. What was the page, please?

Q. Start with page 152, paragraph 244. I might say that this type of study of central office expense continues through page 159 to 161, paragraph 261.

A. Yes. Well, I could see here, some of these items were studied, and I was laying down principles that would be applied. Now, to the extent that you have provided data of the kind I have described here, I would——

Q. Well, I am reading here the sentence that appears beginning at the bottom of page 23, "In Borden's cost study, no attempt was made to allocate central office expenses as between chains and independent stores—"

Now you refer specifically to that in that flat statement, only to executive time, is that correct?

A. Yes, I do.

Q. You can see why the definition previously becomes [fol. 109] inconsistent with that statement?

A. Yes. Well, I think it is defined in "although the defendant conceded that the getting and holding of chain store business was the function of top management."

Q. Yes, but "central office expenses is not relative to top management, is it?

A. No, it is part of that area of indirect costs, however, and I did not know and I could not determine from this data, just how far you had gone.

Q. Do you know of any facts, or was your attention called to any facts in the material submitted to you as to why the conclusions that you sought to draw from this instance, were incorrect—I withdraw that question, because I think I can make it more pointed.

Were you aware—you did not see the final pretrial order, did you?

A. I don't think I did. It is not listed, is it, in those items?

Mr. Long: Of course; he saw it—well——

By Mr. Ball:

Q. Were any facts brought to your attention as to testimony as to the relative time spent by account executive officials, top executives and officials of the Borden Company [fol. 110] with respect to chain and independent store business?

A. No, I saw no such data.

Q. Now I turn to paragraph (1). Now will you turn to where you say that there is an indication in paragraph 196MD that the drivers' activities were directly related to volume purchased by each customer.

I would like to have you explain what it is in 196MD that led you to that conclusion.

A. Well, I would say this sentence is highly suggestive of the fact that the drivers do influence volume, and I quote: "It is also the practice of the wholesale route man to anticipate the requirements of each individual store customer and, at the time of delivery, to leave quantities which, in the route man's opinion, are sufficient to supply the daily sales needs of the customer."

Q. Now, I am correct, then, in assuming that your assumption that the cost of the so-called drivers' commissions were related to volume, is based upon your assumption that the drivers have an influence on the volume of the sales made.

A. Yes, I believe the more fluid milk is sold, the better the salesman is off financially, and he does——

Q. Yes, but that in itself would not do it, unless a driver [fol. 111] had some control of the amount he was going to sell.

A. Well, in this statement "in the route man's opinion" is very suggestive to me that he was exercising a judgment.

Q. You did not answer my question, Mr. Sawyer. It is the assumption that you make that the driver does influence the amount of the sales in some way or another, that leads you to the conclusion that there is a connection?

A. Yes.

Q. Now are you aware, Mr. Sawyer, of the facts set forth in pretrial order at paragraph 112MD, that the sales promotion activities—that appears on page 70.

A. All right.

Q. —that the sales promotion activities are divorced from the responsibility of the drivers and based upon the solicitors who are entirely an independent group of people.

A. That is the function of developing new customers, isn't it?

Q. No, if you would read that carefully, you will find that is the function of promoting sales by existing customers as well.

[fol. 112] A. Yes, I see what you mean. Yes, I recall this now.

Q. Did you take that fact into account when you expressed your opinion?

A. I don't think that contradicts the opinion which I expressed, based upon the subject——

Q. Well, did you take that into account?

A. Yes, I did, yes.

Q. Now, were you aware of the facts set forth that —well, put it this way, are you aware generally of the way in which the assignments that are given to the route man, as to what their functions are?

A. Well, generally—not only physically to deliver the milk—but generally to give the service that is required by a customer in the placement of the milk in the customer's place of business, which I understand they did not do at the chain stores, and in some occasions to collect on a c.o.d. basis.

Q. Now, where did you derive that information?

A. I can't say specifically.

Q. Well, that is something that Mr. Woolley or Mr. Jinkinson had told you, or was that in your data?

A. I don't think they told me that. I read somewhere among those documents generally what they did.

Q. Did you find anything specifically that they did that [fol. 113] tended to increase the net sales upon which they were paid commissions?

A. I based my opinion which I expressed here on the particular statement which I think was made by Mr. Malone.

Q. Well, were you aware in drawing that inference that if a driver estimates the next day's sales of his store customer in excess of what they are, that he then takes the

milk back under the city ordinance, and that that is netted against the sales upon which he receives commissions?

A. Yes, I understood that also.

Q. Well now, in what possible way would estimating the amount of milk to be left with a particular store, influence the sales of that store to its customers?

A. Well, I would think that the fact that the salesmen profited financially in building up the volume to the utmost extent possible, even considering this return situation, would have an influence upon total volume.

Q. Well, that is a surmise not based upon any facts, is it, on your part?

A. Yes, I think it must be, having read the contract, the later contract, and seeing how it worked.

Q. Well, what provision in the contract suggests that?

[fol. 114] A. The commission provision, how it steps up with the total number of points sold in the week or months; I forget what unit.

Q. Well now, Mr. Sawyer, how is it that a driver can influence the amount of milk that the customers at the store buy the next day, in the next twenty-four hour period?

A. I don't know whether I can answer that question on a factual basis. I see here a set of conditions which I would interpret as tending to maximize the volume.

Q. But as a matter of fact you do not know of any way in which any action of the driver in delivering so much milk in one day is going to increase the sales of the customers in that store for the next twenty-four or forty-eight hour period?

A. No, I merely say that under the conditions, there is a reasonable expectancy that that would happen.

Mr. Ball: I am just wondering if this would be a good time to break off?

Mr. Long: Are you through?

Mr. Ball: I am substantially through, and yet I may have some more questions. I would like to ask to be excused anyway.

(Discussion off the record.)

[fol. 115] Mr. Stevens: May I ask just one question then to shorten it?

By Mr. Stevens:

Q. Mr. Sawyer, there are a number of paragraphs in the proposed testimony as to Bowman Company which are word for word the same as paragraphs which appear in the Borden Dairy Company closed testimony.

A. Yes, I testified that is true.

Q. And which in effect do not refer specifically to either Dairy?

A. That's right.

Q. I think with respect to several such paragraphs you have indicated in response to questions by Mr. Ball that those were intended to be statements of general principles and not specific criticisms of a cost method.

A. That is right.

Q. And I say would you give the same answers to the same questions if I went through the paragraph with respect to Bowman?

A. That is true.

Mr. Stevens: Then that will save some time for tomorrow.

Mr. Ball: I want to reserve the right to ask a few more [fols. 116-117] questions tonight, but I think I would say that we can adjourn until 9:30.

(Whereupon an adjournment was taken until 9:30 o'clock a.m. Thursday, April 17, 1958.)

[fol. 118] April 17, 1958

Mr. Ball: May I state on the record that on reviewing the matter over the evening we have concluded we have no further questions to ask of Mr. Sawyer in connection with this part of the examination. We, however, again wish to make the reservation that the deposition be not closed until, or subject to any action that may be taken with respect to going before Judge Campbell on the request for production of documents that might be used for further cross-examination.

ALBERT E. SAWYER, a witness having been heretofore duly sworn, further deposeth and saith as follows:

Cross-examination. (Continued)

By Mr. Stevens:

Q. You met Mr. Woolley in May of last year, is that correct?

A. That is correct, yes.

Q. Was that in Washington or New York?

A. That was in New York.

Q. In the offices of what organization?

A. The Albert E. Sawyer Company.

Q. What is that company?

A. That is an accounting firm.

Q. How many partners does it have?

[fol. 119] A. It has two partners.

Q. Does it have a staff of employees?

A. Yes, it does.

Q. How large a staff?

A. Ranging from fifteen to thirty, depending upon the activity that is going on.

Q. Has that organization been engaged to perform cost analyses for various corporations?

A. Yes, it has.

Q. And in such work from time to time have you found it advisable to use a rather large staff performing your work?

A. Yes. The staff has to be augmented for some assignments.

Q. Do you frequently use at least some of your employees on your assignments?

A. Yes. Sometimes just—I am just a consultant and in that capacity only my own time is involved.

Q. On some of your more important assignments, that is by you, I mean the Albert E. Sawyer Company?

A. Yes.

Q. Could you give me some notion of how many man hours may have been devoted to the work involved?

A. I assume you are referring to a Robinson-Patman [fol. 120] assignment?

Q. Yes.

A. I would want to distinguish that because a very large part of our work is in connection with anti-trust matters arising under the Sherman Act.

Q. Conspiracy matters?

A. Conspiracy matters, where a price behavior is important and of course studies of that kind run into tens of thousands of hours at times. On Robinson-Patman matters it would not be unusual for a study to involve several thousand hours.

Q. Several thousand hours?

A. Yes.

Q. I believe you testified yesterday that you spent forty to fifty hours on this matter?

A. Yes.

Q. Was that entirely your personal time?

A. That was all my personal time.

Q. You did not have anyone else connected with the Albert E. Sawyer Company do any of that work?

A. No.

Q. Were you compensated on a professional basis for your work in this case?

A. Yes, I was.

[fol. 121] Q. What was the amount of your compensation?

A. The same per diem that I charge: namely, $35 an hour.

Q. What was the gross amount of the compensation?

A. I can't recollect.

Mr. Jinkinson: I can't recollect, either. I would have to look at the record.

By Mr. Stevens:

Q. I take it it would be forty or fifty times thirty-five?

A. Yes, something like that.

[fol. 122] Q. Was the arrangement for your employment in this matter made by Mr. Woolley on behalf of the plaintiff with you?

A. Yes, it was.

Q. At the time of making that arrangement, did he indicate to you that there was any limit on the amount of funds available for your employment?

A. No, he did not.

Q. Did he tell you to spend as much time as you needed, or did he impose some kind of a restriction?

A. I cannot recall any statement by Mr. Woolley as to—he certainly put no limitation on it, let me put it that way.

Q. Did he in any respect define the area of investigation which you were being asked to make?

A. Yes, he did. He pointed out areas in which there was a division of opinion among counsel and a brief statement of the nature of that difference of opinion.

Q. Did that brief statement indicate, shall we say, the pros and cons on the issues that he described to you?

A. Yes, I think they were fairly stated. He did not just state his own opinion. I inquired as to——

Q. He summarized the reasons for the opposite position [fol. 123] as well?

A. Yes, I think he did.

Q. And it was that summary, together with these various documents described on the list we looked at yesterday, that provided the written material that you used in coming to your conclusions.

A. Yes.

Q. I understood that you had some connection with the Standard Brands case, is that correct?

A. That is correct, yes.

Q. What work did you do in connection with the Standard Brands case?

A. I was brought into the case after the Commission had issued its cease and desist order.

Q. Which was at what time?

A. I think it was sometime in 1938 or early '39. I was approached, as I recall, toward the end of 1939 by house counsel for the company.

My function was to try to assist the counsel for the company and for the Commission, assist them in arriving at some form of compliance report, and in that case it was necessary for me to spend a large amount of time, time running over two or three months, in a detailed review, which was a more detailed review than I have undertaken [fol. 124] here, which resulted in a recommendation by me to counsel for both sides that certain additional studies be

taken, particularly to overcome the Commission's objection to the use of historical allocations as between various products which seemed to be the chief stumbling block there. [fol. 125] Q. Had there been made in that case, prior to your entry into the subject matter, any study of the Central Office Overhead of Standard Brands?

A. At this moment I could not tell. That is twenty years ago.

Q. You do not presently recall any?

A. I don't recall that.

Q. Do you recall whether your recommendation to the Commission and the company included a recommendation that there be an analysis of the Central Office Overhead of Standard Brands and its possible allocation among different customer groups?

A. I do not recall that being isolated as a particular study. We did have to find some way, as I remember it, to set apart bakery products from other products where they were combined in the same route trucks, and that was one of the major issues of the case.

Q. I take it from your proposed direct testimony, Mr. Sawyer, that you would not consider the omission of a study of Central Office Overhead a significant defect in a study if the omission were adequately explained?

A. That is true.

Q. That your objection in part was predicated on the lack of adequate explanation?

[fol. 126] A. Yes.

Q. In the last paragraph on Page 19 of the proposed testimony as to Bowman——

A. Where?

Q. Page 19.

A. Yes.

Q. (Continuing) ——in which the subject of Central Office Overhead is being discussed, toward the middle of the paragraph a sentence appears:

> "The witness considers the failure to make these allocations and the further failure to explain such omissions, other than to cite the fact that such allocations are difficult to make, constitutes a significant weakness in Bowman's cost study."

A. Yes.

Q. And I take it that the failure to explain is one of the conditions of your criticism?

A. Yes, a most important one.

Q. You did note that there had been a citing, c-i-t-i-n-g, of the fact that such allocations are difficult to make?

A. Yes.

Q. And that you considered an inadequate explanation?

[fol. 127] A. Yes, I do.

Q. And you were there referring, I take it, to the references at Page 4, and I believe they may continue on to Page 5, of what is sometimes referred to as the basic manual, as has been identified as Bowman Exhibit 4 in the matter?

A. I think this is the document, plus another which I believe is referred to as the Bergfield deposition. I believe there is some discussion in that also.

Q. That was the only explanation of the omission of Central Office Overhead of which you were aware at the time this proposed direct testimony was prepared, is that correct?

A. Yes, I think so.

[fol. 128] Q. You had not seen the final pretrial order entered on behalf of the Bowman Dairy Company which contained a several page written statement of the reasons why central office overhead was omitted, had you?

A. I do not believe that was among the documents that I reviewed.

Q. And without having read that material, without knowing whether or not the explanation for the omission of central office overhead contained in that material was adequate, it would not be possible for you to express an opinion as to whether or not the omission of central office overhead was or was not a significant defect in the Bowman study, is that not correct?

A. I suppose it would be correct to say that.

Q. It might or might not be, depending on what was said?

A. Depending on what was said.

Q. Now, Mr. Sawyer, on the subject of the com-issions, I think you have indicated in your testimony yesterday that your opinion that commissions should be cnarged on a

volume basis was predicated on your understanding that the method of payment was designed to provide an incentive to increase the volume on each individual route from which both the Dairy and employee would mutually [fol. 129] benefit?

A. Yes, that is true.

Q. And, of course, if the pay plan was such that the increase in volume resulted in a penalty rather than an incentive, your opinion might well be different, is that not correct?

A. Well, if volume affected it either way it seems to me that it is relevant.

Q. Even though the pay plan were not designed to provide an incentive to increase volume?

A. Well, the reading of the union agreement, I think, leaves the clear implication that it is an incentive.

Q. I understand that is your view.

A. Yes.

Q. But what I am trying to understand is that if the contrary were the fact, that it were not an incentive, then your opinion on the method of allocation of those cost elements might well be different?

A. Well, if it were shown that in fact volume was not the controlling condition here, that would be true.

Q. Now, Mr. Sawyer, I notice in your proposed direct testimony that you make reference to some of your more important assignments, and specifically I notice the Graphic Arts vs. Converted Paper Products, wage rate conflict in [fol. 130] NRA code.

A. Yes.

Q. Now, you have had some experience in connection with wage plans and pay plans of one kind or another, I take it.

A. Yes. In those early days I was interested in that. I have not been in recent years.

Q. Has it been your experience that a piece work type of pay plan is designed to provide an incentive for each individual employee to maximize his own output?

A. I would think that was one of the elements of such a plan.

Q. Has it been your experience that labor unions generally favor that type of plan?

A. I know that some are strongly opposed to it.

Q. Some unions are strongly opposed to that?

A. Yes.

Q. Has it been your experience that labor unions generally are opposed to pay plans which are designed to provide incentive for increasing the output and income of individual workers over and above those of the group as a whole?

A. I know that is the opinion of some labor leaders. [fol. 131] It is a point of controversy, shall I say.

Q. Have you had some familiarity with problems created by payment of additional compensation for work beyond a certain number of hours a day, either under statute or agreement with unions?

A. No. I have had very little experience in labor negotiations, as such.

Q. Have you had experience in cost accounting in connection with the allocation of premiums paid to wage-earners?

A. Yes. That is a matter which comes up from time to time.

Q. In such work have you followed the practice of considering time and a half or overtime pay as pay which is incentive pay designed to encourage the employee to work longer hours?

A. I do not recall a specific instance in which I have dealt with that. It does arise as a problem.

Q. Is it your understanding that the extra compensation in such agreements is designed to provide the individual employee with an incentive to work additional hours each day?

A. Yes, I think there is an incentive there.

Q. Is it your understanding that that is the purpose [fol. 132] of that kind of a pay plan?

A. Well, I think it has a dual purpose. One is a brake upon management. There is a penalty to management that insists on too much overtime.

In other words, there is a balance of two forces inherent in such plan.

[fol. 133] Q. Well, have you had any work under the Fair Labor Standards Act?

A. No, not since the Act itself became organized. I did some work—by that I mean the provisions of the Act,

as you may recall, set out a system of industry committees. When the rates were being raised from the initial 25 cents an hour, then to 40 cents, then to higher amounts, industry committees would be convened.

Those committees were made up of representatives of management and labor and the Government, and my work with the Bureau was limited to guidance to industries in participating in that committee plan.

Q. Have you understood that the overtime provisions of that statute—and by that I mean the provisions of higher rates of pay shall apply for additional hours of work—were designed to encourage employees to work additional hours?

A. As I said, I think the same consideration applies, that there is a balance between proper compensation for overtime on the part of the employee and a brake upon management in the abuse of overtime assignments.

Q. Did I understand you to say that you have not been presented with the problem in your own personal work of selecting a proper method of allocation of premium [fol. 134] compensation, that is, overtime compensation of wage earners?

A. Well, that usually comes up in most of these cases. I do not recall a specific instance in which I personally participated.

Q. Do you recall any instances in which such premium compensation was treated any differently than the wages as a whole?

A. I do not think I can recall.

Q. Now, on Page 18 of the proposed testimony in Paragraph I, there is a discussion of the allocation of transportation costs to customers, and you indicate that a choice of methods is presented; is that correct?

A. That is true.

Q. Will you tell me what factors would govern the exercise of that choice?

A. Well, where you have a situation, as in the case of transportation, where the bulk and the weight of the load have a direct bearing upon the costs, it seems to me that there is important obligation to explain why that is not used if other methods are adopted.

Q. Is that principle predicated on your belief that the bulk or the weight have an important effect on the cost of [fol. 135] operating?

A. Yes, where you have a close logical connection it should prevent it.

Q. Are you familiar with the Accountants' Hand Book?

A. Yes, I am.

Q. Are you aware of what I learned the other day, namely, that Professor Taggart apparently wrote the distribution section in at least the Third Edition of the Accountants' Hand Book?

A. I did not know that. I knew that his associate, Professor Paton, wrote the distribution section of an earlier edition.

Q. Well, in any event, I would like to read a paragraph from Page 337 of the Third Edition of the Accountants' Hand Book and ask you if the opinion expressed in that paragraph accords with your professional experience and views. It is the paragraph entitled, "Fixed and Variable Costs":

> "A factor which limits the practical utility of distribution cost analysis is the large proportion of relatively fixed items among distribution costs. These [fol. 136] fixed items comprehend more than those elements of cost which are commonly called fixed, such as depreciation, insurance and property taxes.
>
> "They frequently cover entire distributive functions. An example is truck deliveries.
>
> "If regular truck delivery service is maintained over certain routes, the total cost of operating the trucks is a relatively fixed amount, including gasoline, wages of drivers, and all other items. Comparatively little difference is caused by weight or bulk of goods carried, or the size of individual orders, although the number of delivery stops has some influence on the time required and may affect certain cost elements."

[fol. 137] There is more which you are welcome to read, if you like. I would like to ask if that statement is in accord with your experience and your views?

A. I would make this reservation on a statement of that kind. Where you are applying this to a Robinson-Patman

question, I do not think that would be controlling. I think it would be incumbent upon the proponent of a justification to make a determination as to whether, in fact, these differences were, as indicated here, negligible.

[fol. 138] Q. Mr. Sawyer, I do not believe you have answered the question. The question is now what bearing this statement has on this case or on Robinson-Patman. The question is merely whether you agree with the statement and whether your experience accords with the factual statement there.

A. I would want to make qualifications on the illustration of the truck. There are many situations where that would not apply. And I don't think the author of the paragraph intended to overlook that. It depends on what you are carrying and the character of the whole trucking operation.

Q. Well, let's take it part by part. The sentence, "If regular truck delivery service is maintained over certain routes"—that is the type of situation we are dealing with in this case, I take it?

A. Yes.

Q. "The total cost of operating the trucks is a relatively fixed amount." Now, that is the entire conclusion as to which you may wish to make reservations?

A. Yes, because——

Q. Let's take the separate items, including gasoline. Now, would there be much change in the cost of gasoline [fol. 139] depending on the load of the truck?

A. I am not an engineer. I would assume there would be. The heavier the load the more gasoline would be consumed.

Q. You would assume there would be a substantial difference in the amount of gasoline consumed by a milk truck driving on its route as the size of its load varied?

A. I would assume there would be a difference. Whether substantial or not would depend on the facts, I assume.

Q. Do you think variation in the load of the truck would have as much effect on the amount of gasoline consumed as the variations in distance driven?

A. I suppose distance would have its effect, too. I am not prepared to say in any quantitative—or let me put it

this way. I am not prepared to make a quantitative evaluation of these things, because I simply do not know.

Q. You don't have the facts?

A. No.

Q. Well, would that be a consideration which would be of importance to you?

A. Oh, yes, very much so.

[fol. 140] Q. And if you found that the gasoline had a more—excuse me—that if the distance traveled had a more direct effect on the cost of gasoline, than the variation in the load carried by the truck, what effect would that have on your choice of methods for analyzing transportation costs?

A. Well, I would say that one would have to look into all of those facts and make his choice in accordance with what they show. It is rather hard to just theorize about it.

Q. Well, now, as per this statement, "Comparative little difference"—I am reading from the book again—"is caused by weight or bulk of goods carried."

This is, of course, assuming a fixed route, same distance, traveled every day. I take it you do not necessarily agree with that statement?

A. No, I would not want to accept that as a flat statement of cost procedure.

Q. Well, is your assumption that transportation costs should be allocated on a volume or weight basis predicated on your disagreement with this statement?

A. I am disagreeing with the way you are using it. That statement is for general accounting use. In a Robinson-Patman situation you are distinguishing between certain [fol. 141] customers and other customers, all customers being on the same route. And it requires a somewhat different approach to make that distinction costwise than it does to account for the cost of the route as a whole. That is my disagreement.

Q. This is merely a statement of fact in here: "Comparative little difference is caused by weight or bulk of goods carried," and has no reference to any type of proceeding as I read the Handbook.

A. No, but as an accountant I would interpret that to refer to the total cost of a route. And what I am referring to here in the proposed testimony is a distinction between

certain elements of the route. I am not concerned with the total cost. I think that makes a—leaves you with a different problem of evaluation.

Q. You think each element on the route should be evaluated separately?

A. Your routes, as I understand it, serve two classes of customers, one class receiving a larger discount than the others; that is my assumption. And the purpose of the cost inquiry is to properly allocate the cost load to those two classes of customers. And it seems to me that involves a somewhat different technique than merely the ascertainment of the total cost of the route as a whole. We are not [fol. 142] interested in the breaking down as between the customers on the right side of the street and the customers on the left.

Q. But in doing this job, is it your opinion that each cost element should be analyzed separately?

A. Yes, I think it should.

Q. And would each one then be allocated as among customers on the basis of a service unit which had the most direct relationship to that particular cost element?

A. Yes, I think that is so.

Q. Then, would you say that if the facts could be shown that gasoline usage was most directly affected by distance, that the gasoline cost should be allocated on some sort of a distance formula?

A. Yes, I suppose that is correct. Again keeping in mind that you are segregating two classes of customers.

Q. Yes. And if, for example, it would be shown that a dairy, say, had half a dozen routes with a chain store on each route and by reason of a contract with the chain or any other provision that perhaps required delivery during a rush hour or some particularly difficult time to make [fol. 143] delivery, that the dairy was compelled to keep its trucks parked in front of the chain store on each route for half of a working day, and this was a condition that pertained every day for every chain store, would it not then be reasonable to say that half of the item of depreciation of those trucks should be charged against the chain, since half of the truck time was spent at the premise of the chain?

A. Those are certainly pertinent costs.

Q. On such facts and for particular certainty of cost, it would be proper to use time as a method of allocating that cost?

A. Yes, I would think there would be a strong indication that that would be proper.

Q. That would be proper; and I take it the same reasoning would apply to the item of insurance costs, which are renewed periodically over a period of time?

A. Yes, I think so.

Q. And to license fees?

A. Yes.

Q. And if drivers were paid on an hourly basis, I take it you would make the same analysis as to the hourly wage of the driver?

[fol. 144] A. Yes, I suppose that is true.

Q. Now, have you formed an opinion as to which is a preferable method as between bulk and weight for purposes of analyzing, say, maintenance costs on a vehicle or other types of operating costs?

A. Again, I think it would depend upon the particular facts of a situation.

Q. And would one significant fact be that—let's assume that a truck has a certain capacity in terms of pounds; that when the truck reaches a load of that weight you have to buy another truck and incur the additional expenses that go with maintaining another truck; that, then, the weight of the load might be perhaps the more appropriate factor to use?

A. Yes, I can conceive of situations where the weight of the load would be an important consideration.

Q. Where that were, you might say, the limiting factor of the load?

A. Yes.

Q. And I suppose if on the other hand the cubic content of the truck provided the limiting factor, then you might select volume?

A. Right.

[fol. 145] Q. And I wonder what your reaction would be if there were provision in the union contract that imposed a limitation on the number of points which could be delivered? Would it be permissible to allocate costs of this nature on a point basis, on the theory that once the limita-

tion on points is reached it is necessary to purchase an additional vehicle and put another route on the street?

A. I suppose if those were the facts that would be an important consideration.

Q. Do you know whether there is such a limitation in the union contract?

A. I don't believe I can say that I do, no.

Q. But if the union contract did provide a limitation on the size of the route in such terms, or in some other terms, perhaps dollar volume or cubic content, then the limitation imposed by the union contract might well be a relevant consideration in selecting the appropriate service unit for allocating your transportation cost and your truck costs.

A. Yes, it certainly would be a consideration.

[fol. 146] Q. Mr. Sawyer, you have done a great deal of work in the paper industry, I believe?

A. Oh, I suppose I have done more work in that industry than most of the others.

Q. I take it your work in the industry has included the Robinson-Patman work as well as other type of accounting?

A. Yes, it has.

Q. And have you had occasion in analyzing companies? I might just preface this by saying I do not mean to invade any privilege. You tell me if any of my questions go beyond what is proper. Analyzing problems to allocate costs among different customer groups?

A. Yes.

Q. Are they problems of allocating as between independently operated customers and large buying groups, similar to chain versus independents?

A. That is a frequent occurrence.

Q. And in reviewing the problems of that industry, have you found then that there are differences in methods of selling or delivering to different customer classes which give rise to cost differences?

A. Yes. There are many such differences.

Q. That give rise to significant cost differences?

[fol. 147] A. Yes.

Q. Have you found that there are areas of cost analysis which you have made which have led you to the conclusion that they do not produce significant cost differences as between different customer groups?

A. Yes, that is true.

Q. So that on the basis of studies which have been made by you of different companies and different segments of this industry, you are prepared, in effect have a head start, when you make another study in that industry and know where you are apt to find the most significant cost differences and where you are apt to find no such significant cost differences?

A. Yes, that is true. A pattern tends to develop.

Q. And as an expert in the paper industry you become familiar with that pattern?

A. That is true.

Q. So that if you are called upon to make a new analysis in that industry, you may on the basis of your own professional judgment leave out certain areas which you know by your own experience do not produce such cost differences?

A. Well, I am not sure that I would just leave it out. I would make an adequate study to be sure that the pattern [fol. 148] was being followed in this particular instance.

Q. But you would think that your professional experience and judgment on the basis of your past studies would lend peculiar weight to the judgment which you might make on the basis of a more abbreviated analysis than you might have made at the first time around?

A. That is true. If the pattern was not being followed I would dig to find out why.

Q. I think I forgot to ask you. In the Standard Brands case which you referred to before, did you work, did you argue the appeal of that case in the Second Circuit?

A. No. I functioned there just as a consultant. I did not have the status of counsel.

Q. Have you had the status of attorney, as counsel, in any judicial proceedings in which you attacked the validity of a cost defense?

A. I don't believe I have. I would have to check back.

Q. Do you recall any instance where you had the status of counsel in a judicial proceeding, a court proceeding, in which you were presenting a cost defense?

A. No.

Q. Have you testified as an expert witness in judicial [fol. 149] proceedings in which the validity of a cost

defense was an issue in the litigation other than in this case?

A. Yes, I have.

Q. Would you name that case or those cases for us?

A. I would have to check my memory on that. The treble damage action which arose out of the Hartford Empire case, I was called upon there to undertake extensive studies and the judicial proceedings were limited to a consideration of my figures for the purpose of settlement.

Q. Was that a Robinson-Patman Act case?

A. Yes. There were two or three of them.

Q. I am not sure I understood correctly. Your participation was in connection with developing the settlement? [fol. 150] A. Yes.

In other words, it wasn't quite the same as taking the witness stand in open Court and so many of those cases terminate in that fashion.

Q. Do you recall any Robinson-Patman Act cases, and I am referring to judicial proceedings, in which you have taken the witness stand in open Court as an expert on cost defense matters?

A. I have a recollection and I would like to correct my earlier testimony, if I may. It has slipped my mind that I was of counsel for the Zellerbach Paper in a Section 2-F case.

Q. Is that a Federal Trade Commission case?

A. That was a Federal Trade Commission case, yes. It was my task in that case to interrogate numerous experts in the field of purchasing, field of cost. Professor Taggart was one of my witnesses.

Q. I take it, Mr. Sawyer, you have done very extensive work in connection with assembling of statistical data and statistical evidence in connection with the defense of conspiracy cases of one kind or another?

A. Yes, I have.

Q. And would it be true that your work involving Robin- [fol. 151] son-Patman has primarily been of an advisory character rather than in connection with litigation?

A. I would say there is an even balance. Now, the litigation, as I pointed out earlier, in that area, frequently never reaches the courtroom, although a great deal of time and

effort is expended in either supporting the charge or otherwise.

For instance, my work for Remington Rand in their ninety million dollar suit against IBM is very extensive but never reached the courtroom.

Q. You were working for the plaintiff in that case?

A. In that case, yes.

Q. Mr. Sawyer, there is at pages 8 through 15 of your proposed testimony, there is a rather extensive description of your background.

Is that something that you prepared especially for this proceeding or is that some material which had been prepared for other purposes and was just supplied to the Government?

A. It was prepared for general use to permit counsel to select such as they wished for their purpose.

Q. I gather then—I do not mean to be facetious—you refer first to he and his, that if you were testifying you would not speak of yourself in the third person, I don't [fol. 152] suppose.

A. No. I think that was redrafted with a view to using it in this particular document.

Q. I see on page 10 you list certain cases: FTC vs. Book Papers Association, that should be Book Paper Manufacturers Association?

A. That is true, that is an error.

Q. Is that the same case that on appeal was the Allied Paper Mills case?

A. Yes.

Q. That was a conspiracy case?

A. That is right.

Q. And the Tag Manufacturers case, that is listed below, that is also a conspiracy case, is it not?

A. Yes. That was a conspiracy case.

Q. Going back to the Allied Paper Mills case, when was it that you worked on that case?

A. I think the complaint was issued in 1938 and I began working on it immediately.

Q. Did you handle the appeal in that case?

A. I was not of counsel then. I was responsible for the preparation of the statistical material under the direction of Mr. Acheson who was the coordinating counsel.

Q. Of the Government?

[fol. 153] A. No, of the respondents.

Q. Your work at that time was at the commission level of the proceeding?

A. That is correct, yes.

Q. Do you recall the date of the cease and desist order?

A. No, I don't.

Q. Wasn't it about 1939 or '40?

A. No. It came later than that because the trial extended on into the early '40s. I think I testified in the case either in '40 or '41, and my assignment was then completed and I have no distinct recollection of just when the order was issued.

Q. Were you an independent practitioner at the time of your work in that case?

A. I don't think I was a member of the Bar when the case began. I was admitted to the Bar in 1939.

Q. In Washington, D. C.?

A. In Washington, D. C., yes.

Q. Well, were you an independent business man at that time?

A. No. I was on the staff of the law firm in New York, Weis, Co-lett and Canfield who were counsel for the American Paper and Pulp Manufacturers Association and [fol. 154] also counsel for the Book Paper Manufacturers Association.

Q. Those are associations which you now represent, I take it?

A. I don't represent either of those at the present time.

Q. Oh! Now, turning to page 16, paragraph A of your proposed direct testimony, is it not true, Mr. Sawyer, that that paragraph is almost a verbatim excerpt from pages 576 and 577 in the Anti-Trust Bulletin of January, 1956, which reprinted your speech to the Illinois Bar Association?

A. Yes, I think that is a fair statement.

[fol. 155] Q. That you drew on this article to make this statement?

A. Well, I wouldn't say necessarily that article. I have used language of that kind a number of times. I don't know just when it first appeared.

Q. Is it not also true, Mr. Sawyer, that Paragraph B

of your proposed direct testimony, consists of almost a verbatim statement of one paragraph that is found on page 577 of the same article in the Anti-Trust Bulletin, and then the latter half of Paragraph B consists of an almost verbatim statement of another paragraph on page 578 of the Anti-Trust Bulletin. I will refer you to the bulletin I have indicated——

A. Yes, I drew upon the work that I have done over the years in the preparation of this document.

Q. Now, is it not true that at those stages of your article in the Anti-Trust Bulletin which was a reprint of your speech to the Illinois State Bar Association, you were in effect giving lawyers advice as to the proper method of presenting a cost defense in a litigated matter?

A. I have used the same words before accountants.

Q. Well, I didn't mean to emphasize the "lawyer" aspect of it, but rather you were describing the method which [fol. 156] you think would be appropriate in making the most effective presentation of a cost defense in a contested matter.

A. Yes, I made the statements before accountant groups as I have before groups of lawyers.

Q. In other words, you were in effect dealing with a problem of persuasion, that is the problem that the cost accountant and the lawyer jointly face in trying to persuade the tryer of facts that his attempt would be valid.

A. Yes.

Q. And that is the context in which the statements which now appear in Paragraph B of your proposed testimony were originally drafted?

A. Yes, I think that is a fair statement.

Q. Now, is it not also true, Mr. Sawyer, that subparagraph (c) of your proposed testimony, is also substantially drawn from pages 579 to 580 of the article in the Anti-Trust Bulletin?

A. Yes, all of this material which is here for the purpose of laying down the basic principles which apply to the problem of this kind.

Q. Is it not true, Mr. Sawyer, that at the bottom of page 579, introducing the general discussion of which this Para- [fol. 157] graph (c) forms a part, you did express the condition, "Unless the entire study can be put into the

record by stipulation, and this is seldom possible"—and then the text continues.

A. Yes.

Q. So that the context in which the language which now appears in Paragraph (e) was originally drafted, was a context in which you were assuming that the record would not be stipulated?

A. Yes, I think that is true.

Q. I think you have indicated you were advised by Mr. Woolley that the procedure in this matter was largely being handled by stipulation and informal inspection of records by both parties.

A. I was informed that this was a unique procedure, and I doubt whether that procedure was in my mind at all at the time I produced the articles from which you read. As we struggled with these problems new methods of dealing with them were coming into being, and we have that before us now.

Q. Did Mr. Woolley indicate to you at any time what efforts he had made to obtain additional information from the Bowman Dairy Company, or to verify underlying data of the type of material which was shown to you?

[fol. 158] A. I don't recall an extended discussion of that. I believe I was shown some material which was received later than other material, but no special significance was attached to it.

Q. Of course, as a lawyer, Mr. Sawyer, you are familiar with the Federal Rules of Civil Procedure, and the discovery provisions of it?

A. That's right.

Q. And did you have any feeling at any time in making your analysis of the Bowman material, that any factual information was either not available or would not be forthcoming upon demand?

A. I don't think I gave consideration to that, because my assignment here was one of review of the basic principles applicable, rather than a detailed check-up and appraisal, a substantive appraisal of the——

Q. Would it be correct to say, Mr. Sawyer, that you were asked for an opinion upon the limited body of material that was supplied to you, and you did not understand it to be part of your assignment to request such ad-

ditional information as might be necessary in order to enable you to form valid judgments as to this particular problem?

[fol. 159] A. No, I was not given the assignment to reconstruct the studies or to supplement them in any way; otherwise I would contrast my assignment here to that which I had with Standard Brands which embraced the complete detail of review and calling for additional studies of considerable magnitude.

Q. Just to make sure that the record is clear, Mr. Sawyer, did I correctly summarize your understanding of your assignment?

A. Yes, I think so.

Q. And that, of course, would be a radically different type of assignment than the one you performed at Standard Brands, or one where you might feel free to spend hundreds of man hours of your staff time giving you the data that you might desire?

A. Yes, that is true.

Q. In Paragraph F on page 17 of your——

[fol. 160] Mr. Haskins: Before you go into the substantive, let's take a few minutes recess.

(Whereupon a short recess was taken.)

By Mr. Stevens:

Q. I had just directed your attention to Paragraph F, Mr. Sawyer, on Page 17, in which you refer to a special obligation upon the proponent, toward the bottom of the paragraph.

A. Yes.

Q. I believe you testified yesterday that you considered that a legal opinion that you were giving there?

A. No, I hope the record shows that I used the word "burden," and I did state that I used that in its legal sense.

Q. I didn't mean to say that you were speaking as a lawyer, but, rather, that in your combined capacity, that was your understanding of what the statute required.

A. But I did not intend to state that this entire sentence is a legal opinion.

Q. Well, now, this special obligation that you referred

to, do you find anything in the Robinson-Patman Act that describes any such special obligation?

[fol. 161] A. I think you have to deduce that from the nature of the proviso itself.

Q. Do you know of any judicial decision in which a Court has described this special obligation that you were referring to in this paragraph?

A. I think you will find a number of references to the fact that the use of that defense imposes an obligation.

Q. Oh, yes, Mr. Sawyer, but my specific question is whether, when you are presented with a choice of methods of allocation, one of which is more favorable to the justification, and one of which is less favorable, do you know of any judicial decision indicating that you are under any duty to make any particular choice as between the two alternatives?

A. No, I don't think I can point to any exact language in a decision on that point.

Q. Do you know of any case which even hints in that direction?

A. I don't believe I do.

Q. Now, Mr. Sawyer, in Paragraph K on Page 19, the last paragraph on the page, the second sentence states, "However, Bowman did charge their independent stores [fol. 162] with a cost of solicitation, but did not make an equivalent charge to the chains."

Is that something that Mr. Woolley told you?

A. I don't know whether it was something Mr. Woolley told me or whether it appeared in the documents.

[fol. 163] Q. Well, in your oral discussions with Mr. Woolley did that seem to be a matter of fact as to which the two of you were in agreement?

A. Yes, I think so.

Q. Do you know by what method the cost of solicitation was charged against the independent stores in the Bowman study?

A. I do not recollect now.

Q. Do you recollect how any costs were charged against independent stores in the Bowman study?

A. I think for details of that kind I would probably view a large mass of material dealing with the two dif-

ferent companies, and precisely how one detail was handled, I would not now recollect.

Q. It would be difficult to keep it all straight, in view of the volume of material you had to go over, and the short time you had to devote to it?

A. That's right.

Q. Let me see if I can refresh your recollection briefly: Do you recall that there were various cost elements that were included in a cost-per-route day in the Bowman study, and eventually brought down to a cost-per-route minute, and allocated among customers on the basis of drivers' time?

[fol. 164] A. Yes. You do recall to my mind that there were rather elaborate techniques employed.

Q. And that that total cost was apportioned among the customers served on the basis of the driver's time?

A. Yes.

Q. And do you now recall that the solicitors' costs were included in that total cost?

A. I believe they were.

Q. And therefore they were included among the costs that were apportioned as between chains and independents on the basis of drivers' time?

A. I think that was the basis used; I am not quite sure.

Q. And if I am correct in my statement—I am not intentionally misleading you—if I am correct in my statement that would, in turn, mean that a portion of the cost of solicitation was thereby charged against chain stores?

A. Would you mind repeating that?

(Question read)

By the Witness:

A. To get the import of what you were trying to say, I would have to go back a little bit further.

Q. Let's go back this way: Is it not correct that the various items of cost which went into the operation of [fol. 165] a route, went into this total cost-per-route day, and then into the cost-per-route minute, and then those costs were allocated as between various customer classes on the basis of the driver's time?

A. Yes.

Q. And that since the time was partly charged against chains, and partly charged against independents, that would have the effect of charging the various cost items that went into that calculation against both customers——

A. That is true. Anything that was in that minute would, of course, be applied.

Q. And of course if the costs of solicitation went into that minute, they would, of course, also be charged partly against chains and partly against independents?

A. Yes.

Q. So that if the costs of solicitation were really costs which were primarily incurred for the purpose of maintaining independent business, this would be a procedure which would have the effect of making a charge against the chains which, if anything, was prejudicial to the study, [fol. 166] rather than favorable to the study?

A. That is true, yes.

Q. So you would not consider that a weakness in the study?

A. Well, it might be.

Q. A weakness only in the sense that there may have been a failure to justify as much as could have been justified if there had been a different presentation?

A. Yes, I think that these things have to be taken into account. If the technique used does not result in a proper division of such costs, then one wonders how sound it is, how many other things might be involved.

In other words, it might cause you to be more concerned with the validity of the particular procedure being employed.

Q. I have before me a copy of an article written by Professor Taggart on the Standard Brands case which I presume you have seen at one time or another?

A. Yes.

Q. And in the interest of brevity I will just read a portion of it, and then I will let you look at the whole thing, if you desire.

At Page 249 in the section on Summaries and Conclu- [fol. 167] sions on cost justification, it is discussing about

one criticism made by the Commission, and I will just read the one part:

> "The Commission reasons that if 40.13 per cent of total indirect costs were applicable to baker's yeast, then 40.13 per cent of each individual item of indirect cost was so applied. This is a fallacy. The fact is, of course, that the 40.13 per cent is an average, and that as a matter of fact some items of the indirect cost are applicable 100 per cent to pound yeast, others are applicable not at all to pound yeast, and still others at varying percentages ranging between zero and one hundred. It is impossible to prove the correctness of the average except by proving the propriety of the pre-determined percentage factors, since the 40.13 per cent results from their application. However, it is thoroughly unreasonable to try to show that the 40.13 per cent is wrong merely by demonstrating that this average percentage cannot be applied to each indi- [fol. 168] vidual item of indirect cost."

I would just like to ask you if you would agree with the reasoning of Professor Taggart in that statement.

A. Well, I think I would agree, but I want to make a lit-le reservation on the last sentence. This is written in a rather complex context, and when you pick an item of this kind out of a matter as voluminous and intricate as that, it is rather hard to say, "Yes, I agree."

Q. I appreciate that.

A. And I don't know just how he intended this last sentence to be understood.

[fol. 169] Q. Now, in the same paragraph on Page 19 towards the end of the first sentence in that paragraph there is a statement:

> "The defendant conceded that the getting and holding of chain store business was the function of top management."

A. May I ask——

Q. I am sorry, that is on Page 19.

A. I had the wrong page. I am sorry. Yes.

Q. What representative—strike that. I will put it this way.

Is that something Mr. Woolley told you?

A. No, I think I gathered that from something that was recorded as having been stated by Mr. Bergfield.

Q. Did you read some of the testimony by a man named Eggleston in connection with the review of the documents?

A. Yes, I did.

Q. Now, could it have been in his testimony?

A. I was just thinking it could have been in his testimony.

Q. I do not have that, but I have Mr. Bergfield's testimony; do you think you would be able to find it in Mr. Bergfield's testimony?

[fol. 170] A. I believe it was Eggleston's.

Q. You are quite sure it was Eggleston?

A. Because the Eggleston testimony, as I recall it, dealt at some length with negotiations with the A&P.

Q. So when you refer to the defendant conceding something, you are perhaps more precisely referring to the witness Eggleston testifying to that effect?

A. Yes, I think that is a correct statement.

Q. And I take it you must have been under the impression at the time of his testimony he was an employee of the Bowman Dairy Company?

A. I am not sure how that read.

Q. Did anyone on behalf of the plaintiff ever tell you that Mr. Eggleston was subsequently indicted for perjury?

Mr. Jinkinson: Now, I object to this question. It is irrevelant, immaterial and incompetent, having no bearing on the issues in this case.

Mr. Stevens: I think it is appropriate to ask what the witness knows about the source of a statement made in his proposed direct testimony.

Mr. Long: I object to it on the further grounds this is part of a record of the 1953 case and had been given and [fol. 171] will be given such weight as Judge Campbell wants to give to it.

By Mr. Stevens:

Q. Well, I will ask you if you want to answer my question, Mr. Sawyer.

A. I did not know the fact you stated.

Q. And I take it you do not know of your own knowledge that the defendant Bowman made any kind of concessions such as is described in this paragraph?

A. No. Whatever I know about this has been derived from either the Eggleston or the Bergfield material.

Q. Mr. Sawyer, just to save time, I have the cost section of the Attorney General's Committee's Report, and I take it if I read various provisions from the cost section, that you would not differ with them, or do you feel you have some important differences with the work of the Committee?

A. I have no differences.

Q. With the cost section?

A. With the cost section. I had considerable to do with it, in its preparation.

Q. Yes, I understood that you did, so I will just save [fol. 172] the time and we can always refer to that later.

Does the underlining in your proposed testimony have any particular significance as a description of oral testimony?

A. The usual manner of emphasis.

Q. I suppose if given orally you would speak that part in a louder voice?

A. With vigor.

Q. And with vigor. Well, in one of the underlined passages on Page 19, referring to the very last sentence in the paragraph which carries over, "Experience indicates that this element of cost is not de minimis," and so forth.

What do you mean by de minimis?

A. That it is too small to produce an injury to competition.

Q. But do you have any measurement of the size of the effect which an allocation of this item expense must have in order to be large enough not to be de minimis?

A. There is a considerable discussion of that point in the Commission's opinion in the United States Rubber case. I think there was more than one United States

Rubber case. The one I refer to is that which deals with [fol. 173] certain types of women's shoes or shoes for chain distribution.

Q. Have you in your professional experience in some instances found that this element of cost is de minimis and in other instances found that it is not de minimis?

A. Yes. It can go either way dependent upon the circumstances.

Q. And is it also true of your professional experience that in the cases where it is not de minimis but rather is significant, that sometimes a consideration of this cost will have the effect of justifying a wider cost difference and at other times will have the effect of justifying a less wide cost difference?

A. Yes, that is true.

Q. Now, I believe you have testified that you have never made a cost study in the dairy industry?

A. That is true.

Q. And that would include advisory work of dairies as well as testimony in litigated matters?

A. Yes, that is true.

Q. You have not been retained in a professional capacity by any dairy?

A. That is correct.

[fol. 174] Q. Are you familiar with any literature in the field of distribution costs in the dairy industry?

A. No.

Q. You would not consider yourself an expert on dairy distribution costs?

A. No, I would not.

Q. Now, Mr. Sawyer, going to Paragraph H of your proposed direct testimony, which begins on the bottom of Page 17, in which you are discussing transportation costs and the dual functions performed by the route drivers, when the driver is engaged in the physical movement of milk from the dairy to the customer, would you consider him engaged in the transportation function?

A. When the driver—will you restate that, please? I was trying to find something here that I thought you were reading.

Mr. Stevens: Read him the question, please.

(Question read by the reporter.)

By the Witness:

A. Yes, a certain element of that is necessarily, it seems to me, a part of transportation.

[fol. 175] Q. The first physical movement of fluid milk products from the platform to the customer, and that is part of the transportation function?

A. Yes, it is.

Q. Now, when the driver takes a case of milk from his truck and transports it to a store, is he still engaged in the transportation function?

A. There is an instance, and a rather good example, I think, of where you might take one view if you were making a decision regarding the distribution cost elements in ordinary accounting procedure, and another view if you were drawing a distinction between cost bearing upon one class of customer and another, and that is an important distinction in these Robinson-Patman approaches.

It appears that one of the distinguishing features between these two classes of customers is the fact that in one case he goes into the store and in another case he does not, so that I think you would have to draw a different conclusion.

That distinction would have no significance if you were computing all of the costs of the entire route and not try-[fol. 176] ing to split as between the two classes of customers.

Q. Well, let us approach it this way, Mr. Sawyer. Let's assume that we had no chain store customers and we were only considering the problem of making a cost analysis among various sized independent store customers, and so that in all instances we might assume for purposes of our discussion that the driver would be carrying the case of dairy products into the store;

On such an assumption would it be proper to treat this additional movement as part of the transportation function?

A. That additional movement under that assumption of facts would draw no distinction as between these customers.

Q. As between the chains and independents?

A. Well, you were saying when we were dealing with various classes of independents.

Q. Right.

A. Assuming you had a price differential between the various sizes and if the sale function was the same for all of those classes, then there would be no particular point in dealing with it separately.

Q. There would then be no particular point in dividing [fol. 177] between the transportation function and this other function—I think you call it the service function?

A. Yes. You do not chop up something you do not need to chop up.

Q. So that if we were dealing with a class of customers where it was the regular practice to carry the milk into the store and go back for an additional load, and so forth, you would think it would be proper to treat it, the entire activity of the driver, as one function?

A. Yes. It would not make much difference what you called it.

Q. The only time in which you feel it is proper to make an objection to that approach is where you have a class of customers where the milk is left at the back door instead of brought inside?

A. Well, first of all, you have got to have a price distinction between those.

Q. Yes, of course.

A. Then you move in to find out what procedures, or "methods," as the Act described them are employed.

Q. But then confining ourselves again to the situation where we do not have chains and we have in-store delivery [fol. 178] for all customers and in-store services for all customers, in that situation do you think it would be appropriate to treat the entire activities of the driver as a single function?

A. If there is no difference.

Q. Well, there might be differences among the independent stores?

A. Yes.

Q. But as a regular matter, perhaps not invariably, but as a company practice, the milk would be delivered into the store for substantially everyone in that class?

A. Yes, yes.

Q. So that insofar as your development of a distinction between a transportation function and a service function in this material is concerned, you were intending that to have particular reference to a distinction between method of serving chains and method of serving independents?

A. Yes.

Q. You were not intending that to be a criticism of a costing approach which would be designed merely to analyze differences among independent customers?

[fol. 179] A. No, I do not think so.

Q. To the extent that the approach in the Bowman Dairy Company study has been used as analysis of cost among independent customers, as distinguised from independents versus chains, did you not intend any criticism of the study?

A. No.

Q. Now, going to the problem where we do have both independents and chains, and assume that the driver still has to move his merchandise from the truck, at least, to the back door of the chain, he has to lift it out of the truck, would you say he is still then engaged in the transportation function?

A. I suppose the point of difference, where the point of difference emerges as between the chain and——

Q. And the independents.

A. (Continuing)—and the chains, that is what the whole approach is for, it does not matter what you call it.

Q. In other words, your division into two functions is merely intended to be defined by the point at which there is a difference in the method of service to chains and the method of service to independents?

[fol. 180] A. Yes, that is where the different method of delivery stems from.

[fol. 181] Q. Well, now, supposing that even in case of a chain it is necessary to unload the truck and carry the case of milk to the back door, a few yards. I take it, then, that is still part of the transportation function?

A. Yes, I suppose it is.

Q. And if several cases are carried at one time on a dolly, for example, you would then say that the use of the

dolly and the cost of carrying a dolly on the truck would be part of the transportation cost?

A. I suppose it would. If that would be common to both classes.

Q. That would be common to both classes, that's right. Now, supposing in case of an independent, large independent, the dolly is used to haul the merchandise right into the store, bringing empty cases back out, so that the dolly would be, in addition, used for some functions which were not common to both classes, then how would you consider the charge of using the dolly?

A. Well, it illustrates one of the difficulties of a situation of this kind. First, you must determine that you are up against a distinction in methods of delivery that gives rise [fol. 182] to some cost differences, and then you work out a reasonable method of allocation, where you are going to cut off.

Q. And your problem, I take it, is to find some kind of a common denominator that will enable you to proportion these costs?

A. Yes, it is illustrative of numerous rather annoying problems that you run up against in making these classifications.

Q. I suppose you find the problem of proportioning the cost of laundering the uniform of the driver, who supposedly must maintain proper appearance in both kinds of stores, and particularly in the store of the independent, a cost which would be particularly difficult to apportion without reducing it to some common denominator?

A. Whether that would contribute to the distinction—I would think that would be the same regardless of the store.

Q. Now, in Paragraph J, again on page 18, you refer to the grouping of the results of time studies in the customer or discount classes, the usual rules relating to proper averaging should be observed; that is of homogeneous classes. What classes would you use in grouping these cost elements in the Bowman discount schedule?

[fol. 183] A. Well, I don't know as I am classifying here. I am merely stating a general principle. I am not criticizing your classification. I am referring indirectly to those standards which have been observed by the Commission,

I think expressed by Commissioner Freer in detail form; that the Commission itself in its orders has followed that fairly consistently.

Q. And I take it the different classes that you are referring to are the different classes that would appear on the discount schedule?

A. Yes, there must be a price difference to have any significance.

Q. Would you consider a discount schedule which had a very large number of brackets, each slightly graduated to the next, a more equitable discount schedule than one which had a smaller number of more sharply graded brackets?

A. There again you must of necessity look at the facts. I recall one schedule which I was examining some years ago, in a totally different industry in an effort to see what distinction I had a tabulation run of all of their customers, ranging from those who purchased, we will say, two million dollars worth of goods per year, down to those in the five hundred dollar class. This is the only example in my [fol. 184] experience that I have seen come out this particular way. But from five hundred dollars to two hundred fifty thousand dollars there was not a fifty dollar difference between one customer and the next one. Above two hundred and fifty thousand dollars and one million dollars there was not more than ten thousand dollars difference. With a situation like that it is virtually impossible to set up a graduated scale. It is a continuous——

Q. Yes.

A. All the way through, and it is something between that and the situation that is confronted in, we will say, the can cases, where they had just the opposite. They only had three customers in one bracket and thousands of customers in the other bracket, so it is a compromise between those two situations. It depends on just what the facts are in a particular situation. You are going to have a closely knit set of brackets or one which spreads. You have got to make your customer analysis; you have got to see where these breaks are.

Q. Of course, assuming that you followed the cost curve, of course using the example you gave in analyzing it out, I take it you would consider it would tend to be preferable [fol. 185] to add additional brackets?

A. Yes; well, you don't even consider cost up there. You are considering what the amounts of purchases are.

Q. Now, on page 18, in Paragraph K towards the middle of the paragraph, there is a discussion of the central office problem again, and you say, "Many of the cost involved under this heading may readily be classified as of proportionate application to all discount classes and therefore outside of the scope of the justification study."

Do you have in mind any costs which could be so classified in the dairy industry?

A. Well, it would depend upon the facts. It might be, and I don't know what the situation is in the dairy industry or why it should be any different than any other, but it might be that making invoices, for instance, would be the same for all classes of customers. And, therefore, no real differential as between them. You have got to look at each one of these; there is no set of rules regarding this.

Q. Supposing you had the salary of the president, who might devote himself to work in connection with all classes. I suppose you might find a basis for allocating his salary? [fol. 186] A. Under some circumstances, yes. You would have to look into it. You couldn't just dismiss it because he was president.

Q. Now, if you were to include the salary of the president, how would you do it?

A. Not necessarily by any time study method.

Q. Well, I wonder if you would agree with a statement which Mr. Bergfeld has made in the paragraph on page 29 of the Bowman pretrial order, in which he is referring to this general system and he states:

Mr. Long: May I see that, John?

By Mr. Stevens:

Q. "In allocation of time spent by all central office personnel on transactions of chain stores and of independent stores would be arbitrary and could result in inequitable costs even if each person was questioned individually, say."

That the nature of your reluctance to use time as a method of allocating the central office salaries?

A. Yes, because I don't think time is the measure of it in most instances where you are dealing with that classification of employee.

Q. What are the various measures which you think might [fol. 187] appropriately be used in this category?

A. If we can say, this officer is an employee, I think we are—I can make it more concrete. One important measure is the calibre of the man employed. Let me illustrate: If the president or manager of a division has among his duties the obligation to obtain and to maintain a large customer—you don't have to designate it as a chain, but if there is a large customer or a group of large customers constituting two-thirds of the total business of the division, it should be examined, as a matter of fact, as to what effect that has, that obligation has, upon the compensation paid that person. If he hired merely to manage a group of salesmen, or if two-thirds of his obligation to maintain two or three customers; and in order to carry that on you have to reach out and pay that man a substantial additional salary to get the caliber of man you need.

[fol. 188] Q. In that type of situation if the additional compensation—I phrased that poorly.

If there were no additional compensation or special compensation dependent upon any such special duties with respect to large customers——

A. Yes.

Q. —then your reasoning would not be the same, I take it?

A. That is, of course, as part of your appraisal of the situation, but I feel strongly that where those facts exist where two-thirds of the division's or company's business comes from a small group of large customers who purchase at a differential, that there should be an affirmative showing that there is no effect upon the compensation but otherwise there is a void in your justification.

Q. That would become less important as the proportion of this type of business became smaller?

A. That is true, of course.

Q. So that if larger and larger proportions of the time were devoted to selling milk to restaurants or to retail customers on home delivery routes or selling ice cream and

that sort of thing, that would all tend to minimize the [fol. 189] significance of this factor?

A. Yes, although the distribution of time is not as important.

Q. As responsibility?

A. As responsibility, right.

Q. Mr. Sawyer, in this approach who is it that is to make the appraisal of this division of responsibility of the executive?

A. In one case in which this problem is of prime importance the decision would be made, will be made by the executive committee of the corporation after I have laid before the committee what I regard as my findings of fact.

Q. Have you by any chance read the proposed testimony of Professor Taggart in this matter?

A. Not until it arrived on my desk in this form.

Q. I understand. I direct your attention to Paragraph C of his testimony, beginning on the bottom of Page 6 and carrying over to the top of Page 7. I would suggest that Professor Taggart apparently feels that the apportionment of executive time from among customer groups would be a possible method of allocating this element of cost?

[fol. 190] A. Yes. I don't rule that out where those are the facts.

Q. You did not mean to rule out time as a method?

A. No.

Q. You were merely indicating that there are reasons why time may prove to be unreliable?

A. Yes.

Q. Therefore, while you personally might not select time in a particular case?

A. I was emphatic on that because I had experience with it in a number of situations where that was most important.

Q. Now, if you did have a case, or I should say a situation in which for one reason or another time did seem to be the best you could do under all the facts and circumstances, would you also apportion the costs of maintaining the executive's office, his stenographer's salary, his furniture and the rent for his office on a similar basis?

A. All of those things would have to be taken into consideration.

Q. That would be on the theory that the facilities and

other elements which are necessary to provide the environ-
[fol. 191] ment in which the executive could perform his job should be allocated on the same basis as his own salary should be?

A. Travel, entertainment costs and things of that kind.

Q. Your answer is yes?

A. Yes.

Mr. Stevens: I have very little more, and if you would prefer to stop, I do not care. I think fifteen or twenty minutes, and I will be through.

Mr. Long: We can make a break at the end.

Mr. White: I am going to ask my questions after he gets done.

Mr. Stevens: I am very nearly done. Maybe we can finish and save Mr. Sawyer the afternoon.

(A recess taken.)

[fol. 192] Mr. Stevens: Mr. Reporter, will you mark this as Sawyer Exhibit No. 1 for identification, it being a typewritten excerpt which I made from an article entitled "sacred cows in accounting" by Herbert F. Taggart in the Accounting Review Volume 28, No. 3, July, 1953. Of course we can verify it later; rather than reading it into the record I will ask Mr. Sawyer to look at it and ask if he will agree that in the hypothetical example presented by Professor Taggart in that article that the commission should not be charged directly to the customers.

(The document was marked as requested.)

By the Witness:

A. I have read this during the intermission and I assume you refer to the example on the ——

By Mr. Stevens:

Q. Universal Coffee Company.

A. Universal Coffee Company which appears on the, I think it is the sixth page.

Q. That is what I intended to say.

You would agree that in that type of a situation that the commission should not be charged directly to the customers?

[fol. 193] A. That illustrates very well how the necessity of examining these situations and reacting to the reality of what you see and I would agree with the result which Professor Taggart indicates.

Q. And is it true, Mr. Sawyer, that in your experience with private business of the various kinds that it is not unusual for companies to allocate certain very profitable elements of business to a salesman and impose on him the duty of also calling on less profitable accounts so that in effect the higher earnings he gets from some business is counterbalanced in part by the low earnings he gets from other business? The over-all picture is fair and equitable?

A. Yes. If a salesman is given a territory or a route, something of that kind, it is not uncommon to have it include accounts of varying magnitude.

Q. And if he is paid on a commission basis accounts from which he will in effect be overpaid and other accounts from which he would in effect be underpaid?

A. Yes. That is inherent in the nature of that form of compensation.

Q. The form of compensation, of course, is the commission type of payment?

A. Yes, that is true.

[fol. 194] Q. Oh, yes, on page 20, Paragraph L at the top of the page, you indicate that on certain assumptions which we have previously covered and I won't review those, that it might be proper, the commission costs might be allocated to each customer on a volume basis unless it could be demonstrated to be unfair or inequitable.

I wanted to understand the method of allocation which you were suggesting there on the assumptions which have previously been identified.

Are you saying that each route should bear the commission cost of the driver of that particular route?

A. I don't know whether I am dealing with routes here or with a part of the branch or division, whatever it is called.

Q. You did not intend to make a choice between those two approaches?

A. I am thinking here of using the word volume, the volume purchased by one class of customers as against another. I don't know whether you pick up that commis-

sion of cost on a route basis or not right now. It would not seem to me to be too important. Ultimately you arrive at the volume purchased by customer class A and the volume purchased by customer class B and you distribute on that basis.

[fol. 195] Q. Then you did not intend to refer to volume purchased by each customer but rather volume purchased by each customer class?

A. Each customer class I think would be a better wording.

[fol. 196] Q. Are you able now, on the basis of what you recall of these documents and material which you examined before preparing this proposed testimony, to tell me what are the other respects that you are referring to in the first three words of Paragraph M on page 20?

A. Well, I have pointed out one or two specific things in previous paragraphs.

Q. I am thinking about if there is anything else that you had in mind that you can now recall that should be brought to our attention?

A. From all of the documents that I examined relating to Bowman, I gathered from what I read that elements of the study were originally designed for purposes of personnel control and other management uses not solely for the purpose of a cost justification study.

The language did not read that way. Maybe I am making an unfair criticism, but that is the way the language used reacted upon me.

I am trying to say here that while Robinson-Patman's study may serve in part the purposes of management study, I do not think the reverse is true. Usually management study has quite a distinct difference.

Q. I take it that what you are saying is that it may have been adequate for management purposes but——

A. But not for an adversary proceeding.

[fol. 197] Q. May I summarize it this way, that you were not intending to criticize it insofar as it may have been used for management purposes?

A. No, I am certainly not doing that, but when you have adversary proceedings you have, I think, different standards of proof, and these did not ring along those lines.

Q. They rather rang along the management lines?

A. Management lines.

Q. Then in the very last sentence of Paragraph M, it is rather carefully worded, that the, "Data seems to indicate results which are inconsistent."

A. Yes, because I did not want to put myself in a position of having carefully evaluated these things. That would have taken many months' study.

Q. You would not be in a position to say categorically that there were definite inconsistent results?

A. No. Again, it is something that I gather from the reading of this material.

Q. More in the nature of an impression on the basis of the limited time you had to review the material, rather than a firm opinion after the length of time you would usually devote to this kind of problem?

[fol. 198] A. Yes, I think you put it correctly.

Q. Well now, I have just one more short sentence to read from Professor Taggart's Standard Brands article because I have a feeling that you may be able to pick up the context, but if you can't, I will give you the publication.

One sentence from the article on Page 250 after a discussion of the method of proportioning transportation costs that was followed, he states:

> "Standard Brands' accountants could easily have found authority in Government publications and elsewhere for charging all route selling and delivery costs to customer brackets on the basis of stop time."

That is the whole quote. Would that approach be one which would be not unfamiliar to you, Mr. Sawyer?

A. Using the——

Q. Stop time?

A. Stop time; that is appropriate under some circumstances, yes.

Mr. Stevens: That is all I have.

[fol. 199] Cross-examination.

By Mr. White:

Q. As we noted yesterday, there is a great deal of similarity between your proposed testimony with respect to Borden and Bowman, and am I correct that if I were to ask

you the same questions that Mr. Stevens has this morning, that insofar as they are applicable to your direct testimony as to the Borden Company, that you would give the same answers?

A. Yes, I would.

Q. I wish you would please turn to Page 16 of the proposed Borden order, rebuttal order.

A. Yes.

Q. Which is part of the list of periodicals that you have written for.

A. Yes.

Q. You notice the top one—referring to a round table discussion of the Robinson-Patman Act found in the Year Book of the National Association of Cost Accountants for 1939.

A. Yes.

Q. I hand you that publication for the year 1938, Mr. Sawyer, and ask you if that isn't a mistake and actually you are referring to the discussion that appears beginning [fol. 200] on Page 217 of the Year Book of the National Association of Cost Accountants for 1938?

A. I think that is a typographical error. The year should be 1938 and not 1939.

Mr. White: Thank you. That is all.

Mr. Hart: How long have you got, Bert?

Mr. Long: I have got about five or ten minutes.

Mr. Hart: Well, let's finish it up.

Mr. Jinkinson: Then we won't have to come back.

Redirect examination.

By Mr. Long:

Q. Mr. Sawyer, I think you have clarified this matter of generally your discussions with Mr. Woolley in the examination by Mr. Stevens, but I wonder if in reference to your answers to Mr. Ball yesterday if it is your recollection that you may have received as a part of the handing over of the data and the formulation of the issues here, some expressions of viewpoint from Mr. Woolley at the times he called on you?

A. Yes, I did. I think it would be difficult to explain the [fol. 201] issues in a matter of this kind without revealing some of the opinions that might have been formed by Mr. Woolley.

Q. And did Mr. Woolley make any attempt to influence your opinions?

A. None whatever. Whatever impressions I got as to what his feelings would be one way or the other on this was merely inferred from his descriptions of the material and the issues in the case.

[fol. 202] Q. And the proposed direct testimony contained in the Borden rebuttal order which is before you which you propose to give is your own independent opinion with reference to this case?

A. Entirely so.

Q. Do you have any personal interest in how this lawsuit turns out?

A. I have none whatever.

Q. Now, as you were read excerpts and passages from Taggart Exhibit 1, which is the cost justification report of the Taggart committee, speeches, articles, expressions of your views with respect to other cases, did you note anything inconsistent therein with your proposed testimony here with respect to the Bowman and Borden case?

A. No, I did not.

Q. I wonder if you would also tell us again—I think you have done it, but maybe again for the record, what was the general purpose of Taggart Exhibit 1, the Taggart report?

A. The general purpose of that report, as the committee understood it, at least as I as a member of the committee understood it, was to provide the Commission itself and the accountants and lawyers with a set of principles [fol. 203] which might assist them in meeting the requirements of the proviso of Section 2-A.

It was not to be regarded as a manual of practice because of the great diversity of business organizations and business methods and business situations which become involved in the Robinson-Patman Act. We tried to evolve a statement which could be easily read and brief and yet sufficiently well rounded as to give accountants and at-

torneys on the Commission itself a starting point in the analysis of these situations.

Q. Do I understand, too, from your testimony that there is enough flexibility in here so that it can be applied to many factual situations?

A. Yes, necessarily so. You cannot have rigidity in a matter of this kind.

Q. Now, is it your opinion, Mr. Sawyer, that in making any preliminary considerations as to what method of allocation of cost factors should be made, that all the relevant cost elements must be factually found?

A. That is true.

Q. And after they are all found, what would probably be the next step of the cost accountant preparing a Robinson-Patman cost study?

A. Well, these findings certainly must be integrated [fol. 204] and brought together so there can be a final comparison between the magnitude of the discount and the magnitude of the savings.

Q. Now, do I also understand from your answers to counsel for Bowman and Borden that an essential step that a cost accountant would want to take here after he has found the cost factor would be to adequately analyze them with reference to the distribution system that is in question?

A. Yes, they should analyze the presentation so that they are understood by whoever is going to make the final appraisal of the effort of that justification.

Q. Should they be in such a form that they could be reconstituted or rearranged, depending on whether there might be alternative methods of distribution costs?

Mr. Hart: Oh, I object to that. I think that is going beyond the scope of the examination of this witness on his proposed testimony.

[fol. 205] Mr. Long: Well, I think the record may show the witness has testified with respect to a duty incumbent upon the proponent of these Robinson-Patman cost studies to have all the facts found, the data assembled in such a way that an expert could rearrange and reconstitute the matter following an alternative service unit, if one is appropriate.

Mr. Hart: That is a point with which Mr. Ball made a rather extended objection and I just am renewing it. If the witness would like to answer it, I would be very happy to have it.

The Witness: Would you like me to answer?

Mr. Long: Yes, if you would answer it, please.

The Witness:

A. Well, I have a feeling that the proviso imposes the obligation of presenting the matter fairly so that it can be adjudicated properly. The fairness includes a consideration of alternatives, or some indication of what the result might be if the alternative had been followed.

[fol. 206] By Mr. Long:

Q. Now, do I take it too along that same line that unless the alternative cost factors were developed and available for examination, that in this particular case both as to Bowman and Borden you would prefer that the commission of drivers be allocated on a volume basis?

A. Well, I think I covered that fairly well in my earlier testimony, that based on the facts I have seen, that it would seem to be logical, and I think if that was not used, there should be an explanation of the reason.

I think I indicated the circumstances could be such that that method might not be the most desirable.

Q. Now, if the commission is not a volume incentive payment and is something else, is it not incumbent upon the proponent of this Robinson-Patman Act to develop those facts to show it is not a volume incentive basis?

A. Yes.

Mr. Hart: Well, there I want to make the objection that you are asking him a purely legal opinion.

[fol. 207] Mr. Stevens: Let's add to the objection he is also leading his own witness.

Mr. Long: Well, I am referring to the cross-examination testimony.

By Mr. Long:

Q. Would you answer now?
A. I thought I answered.
Q. Did you? Oh.

Mr. Hart: He did say, as a matter of fact.

By Mr. Long:

Q. Would your answer, with the objection of counsel, be the same to a question as to the duty of the proponent here of these cost justification studies to develop the facts, if they are facts, having a bearing on this problem of the volume incentive payment in commissions with respect to the composition and planning of routes?

Mr. Hart: If you are asking me if my objection will be the same, it will be.

By Mr. Long:

Q. Or the limitation on the maximum number of points that a driver on one of these milk routes can handle; would your answer be the same?
[fol. 208] A. Yes.
Q. Now, I think it is quite clear as to what your principles are with respect to the consideration of the costs of the executive officers of the Bowman and Borden Company, their soliciting, maintaining and obtaining chain store accounts. In your answers to Mr. Ball yesterday I took it that it was not too clear about the general office expenses, including billing, credits and checks with respect to your decision as to whether those ought to be allocated along with the time of the executive officers obtaining or maintaining chain store accounts.
Would you comment on that?
A. Yes. I think that area of expenses should be examined. It is possible that they fall into the category of those things which I mentioned that create no distinctive costs as between the two classes of customers.
[fol. 209] On the other hand, I think anyone who has worked in this area knows that a large volume of either chains or independents, particularly chains, impose upon

sellers obligations in the form of special billing, special statistical reports as to the purchases of their own branches in the various parts of the United States, and whatever the market area is that is involved, and other obligations that call upon the central office clerical force to exert special efforts in that regard.

I think it was incumbent upon the proponent of a cost justification study in the area particularly to ascertain whether such additional costs are involved and to state clearly that that study has been made and that no such burdens are assumed if that be the situation. In other words, an affirmative explanation rather than just an omission of that is required.

Q. You just testified on cross-examination in response to questions by Mr. Stevens with respect to subparagraph M here of your testimony on page 20 of the Bowman rebuttal testimony.

A. Yes.

Q. Would you say that the same principles are involved in your opinion of the Borden cost study?

[fol. 210] Mr. Stevens: This I object to as being beyond the scope of the cross-examination.

Mr. Havemeyer: Yes, it is beyond his examination on the trial order.

By the Witness:

A. Well, I will answer in this way, that Paragraph M represents particularly my impression gathered from the Bowman material; I did not have similar impressions with the Borden material.

Q. Now, if the record does show that Borden also made use of a management cost survey, in the formulation of their cost justification defense, would the same principles be applied to that?

Mr. Stevens: Same objection.

By the Witness:

A. Whatever I said with respect to the use of management studies would apply, yes.

By Mr. Long:

Q. Now, I wonder, Mr. Sawyer, here in response to the question of Mr. Stevens in which he hypothesized with respect to the milk wagon driver carrying the milk into the store, I wonder, would you say categorically that that could only be allocated as a part of the transportation function of the driver?

[fol. 211] A. This is an area where it is difficult to be categorical. I think you would have to have a fair reaction to whatever the facts were, and just where you would cut off, as I think I said in response to Mr. Steven's question, would be a question to be decided on the basis of the particular facts.

Q. But, if——

A. It might be either way, you see.

[fol. 212] Q. But if the record did show that such a cost factor was optional to the store customer and that the stores themselves might come out and carry the milk in, would that have a part in your judgment as to whether that is a part of the transportation function of the driver?

A. Yes; in a complex state of facts as you are dealing with here, you would have to take into consideration all of those things.

Q. I wonder if you would for the record again state the import or part that your direct testimony you think played as to the analysis of the cost justification defenses of Bowman and Borden?

Mr. Stevens: May I have that question read?

(Question read by the reporter.)

Mr. Stevens: I will object to that on the ground it is asking the witness to state what he thinks the effect of this will be upon the Court, which is clearly invading the province of the Court.

By Mr. Long:

Q. Let me ask you for expedition, did you intend this [fol. 213] to be just principles that might be applied to these two cost studies, the Borden and the Bowman?

A. Yes, I did.

Q. And you adopt them as your testimony, whether they might have appeared earlier in an article that you wrote or speech that you made?

A. Yes, I do.

Q. Now, I am not clear, but I think it was in response to a question by Mr. Stevens in respect to the Standard Brands case, referring to Page 16 of your proposed testimony, I believe it was 16-C that Mr. Stevens was inquiring about.

What would be the effect on 16-C exerted by the fact that this case is being handled through pre-trial conferences and stipulation of facts?

A. I do not think you can classify this particular method as the normal method of stipulation. What I had had in mind was what sometimes happens where there is no contest as to the contents of the justification study. That has happened in, oh, a number of occasions in connection with cases brought before the Commission where the proponent has brought a study in and the Commission accountants have raised no objection.

The matter has gone into the record then without any [fol. 214] consideration, both sides accepting what was shown, and I do not think that is quite the situation here. This is more in the nature of a courtroom approach to the problem.

Q. Now, no matter which way it is tried, in your opinion a cost study should contain a consideration of all relevant elements?

A. That is right.

Q. Well, is it also important in your judgment that the relevant cost factors be correctly stated and rectified?

A. I think that is axiomatic.

Q. Now, if, for instance, the solicitors here in both the Borden and Bowman situation have little if any duties in connection with chain stores, would you consider it proper that the time of the solicitor who performs virtually no duties or time with respect to chain stores also be allocated to the chains?

A. I think I indicated earlier in my testimony that every effort should be made to allocate items of that kind correctly, unless it is shown to be a completely unreasonable task.

[fol. 215] Q. Mr. Ball yesterday read, among other things, from the Taggart Exhibit 1, Item 7 on page 11 in the first paragraph, but did not read the second paragraph. If I may, I am going to read that to you now:

> "At the same time—" this was the classification of customers, orders, commodities and transactions.
>
> "At the same time the privilege of classification is not a license to disregard sound business and accounting concepts. In order to become the basis for cost justification of price differentials, the classification should be logical and should reflect actual differences in the manner or cost of dealing.
>
> "Great care should be taken in establishing price classes to make sure that all members of the class are enough alike to make the averaging of their costs a sound procedure."

I gather you agree with that?

A. Yes, I agree with that.

Q. Now, on page 12 of Taggart's Exhibit 1 under the title of "Sampling," subsection 8, there is in the second paragraph of 8 this sentence:

> "The basic requirement for valid sampling is that [fol. 216] the sample be truly representative of the whole."

You are in accord with that?

A. Yes, I am.

Mr. Long: That is all I have.

Mr. Stevens: Recross.

Recross-examination.

By Mr. Stevens:

Q. In response to Mr. Long's redirect examination, Mr. Sawyer, you indicated that you felt that the reasons for not charging commissions directly against customers should have been set forth.

A. Yes.

Q. Now, would you feel that there was any obligation upon a defendant in a case such as this to set forth such

reasons if the plaintiff has stipulated that it was not questioning that item of cost?

Mr. Long: We object to that. If I understand your question, you are misstating the record.

Mr. White: That is a hypothetical question.

By the Witness:

A. If that was the situation there would be no particular point.

Q. There would be no point setting them forth if they [fol. 217] indicated they were not challenging them?

A. No.

Q. You realize now, do you not, the commissions are part of the drivers' compensation?

A. Separate compensation.

Q. Yes, but part of the drivers' compensation. Now, I take it the Government at no time read to you the portion of the record which appears in Paragraph 28, page 20 of the Bowman defense pretrial order, which reads as follows—this is part of the stipulated record, and I did not misstate the record:

> "Plaintiff would accept an apportionment of drivers' compensation among different customers on the basis of drivers' time."

I show it to you and ask if I read it correctly?

Mr. Long: I think the record ought to show that is an item we took up in a conference with Judge Campbell and that matter was left open. It is true there was a tentative agreement on that, but later on we brought that up and I had consultations with Bowman's counsel and we brought it up before the Judge and he left that open to make a distinction between the basic wage and compensation.

You are misstating the record.

[fol. 218] Mr. Stevens: But that was done after Mr. Sawyer was asked for his opinion, and Mr. Sawyer was not shown this statement and he should have been if he was going to express himself intelligently on this subject.

Mr. Hart: Let's leave it that after all Judge Campbell is going to have to decide that.

The Witness: I was thinking the same thing.

By Mr. Stevens:

Q. Well, I just want to be clear on this, Mr. Sawyer, that at the time your opinion was being asked if the defendant was under the impression that no question was being raised as to the apportionment of commission expense, you would not say that at such time there was any duty to come forward with an explanation for the omission of that item, would you?

A. No, I think if both parties were agreed as to the acceptability of a particular thing, I would not have regarded it within the scope of my examination.

Q. Mr. Sawyer, the fact that a particular item of service may be optional in a legal sense or may in some instances not be performed would not be a reason for disregarding it if upon inspection you found that that item of service was [fol. 219] generally and customarily performed for a given class of customers?

Mr. Long: Well, now, of course, we object to that, because I do not think the record is straight on that, clear on that. If you want to make it hypothetical it is all right, but——

Mr. Stevens: I do not think it is hypothetical.

By the Witness:

A. Now, see if I understand this.

Mr. Stevens: Read him the question, please.

(Question read by the reporter.)

By the Witness:

A. That is true.

By Mr. Stevens:

Q. Then one further question. Referring to Paragraph C on Page 16, I think you indicated that you would agree that that paragraph would not be applicable to the type

of Federal Trade Commission proceeding in which the cost study was stipulated in the manner in which you indicated on redirect examination, is that correct?

[fol. 220] A. Yes, where there is complete agreement between the parties, no contest.

Q. Now, when you say complete agreement between the parties in the FTC proceedings which you refer to, do you mean complete agreement as to the admissibility of the study or do you mean complete agreement as to the validity of the study?

A. Agreement as to the validity of the study.

Q. In other words, that there were cases where the Federal Trade Commission was conceding that the cost defense was a valid defense?

A. Yes, they have done that in a good many cases.

Q. And then on the item of collection expense which Mr. Long asked you about, if it could be shown that that item is offset by another cost, such as the cost of sending rebate checks to independents, which would be solely applicable to independents, would it in your opinion be proper to eliminate both items if the objective of the study was to justify a chain discount?

A. Yes, or another thing, and perhaps preferable, is to put both in, one plus, one minus.

Mr. Stevens: That is all.

[fol. 221] By Mr. Hart:

Q. Mr. Sawyer, you appreciate in this case, it being stipulated in the pretrial order, that all of the work papers of Stevenson, Jordan & Harrison, who made up the cost study for Bowman Dairy Company, all of the Bowman accounting records, and so on, for the period of time covered in this cost study, have been available to the Government or anybody they chose to have look at them at any time?

A. Yes.

Q. There has been no reservation on our part as to any of Stevenson, Jordan & Harrison studies such as may have been expressed by the Government in reference to Mr. Woolley's portion of it?

A. No.

Q. Do you also appreciate that these cost studies on behalf of both companies were instituted from 1948 on and that they have been under constant indictment or suit under portions of the Robinson-Patman Act ever since that time?

A. I gather that there was some such history from some of this material.

Q. And knowing that to be a fact, would that somewhat temper your impressions that you expressed in Paragraph [fol. 222] M on page 20 of the proposed testimony in the Bowman rebuttal order, that they were management studies?

A. Well, I still stand by this. I have no other basis upon which to stand, what I have expressed in Paragraph M, as I think I made clear to Mr. Stevens and, it is an impression which I gathered from the reading and I did not intend it to be anything else.

Mr. Hart: That is all.

Recross-examination.

By Mr. White:

Q. You did not mean to suggest, Mr. Sawyer, that it was impossible for a management study to comply with the requirements of the Robinson-Patman Act accounting-wise?

A. No, I did not.

Q. You would have to examine the particular management study in order to see whether in your view it complied with the Robinson-Patman accounting principles?

A. Yes. You have to define first what the management objective is in setting up a management study. It may or may not serve the purposes.

Q. That is right, you would have to examine the study [fol. 223] itself to see whether it adequately reflected the costs involved?

A. Yes.

Mr. White: That is all.

Mr. Long: I have nothing further.

Mr. Stevens: That is all.

Further Deponent Saith Not

[fols. 224-225] Notary Public Certificate (omitted in printing).

[fol. 225a] Stipulation as to signing depositions (omitted in printing).

[fol. 226] SAWYER DEPOSITION EXHIBIT NO. 1

Excerpts from Article: "Sacred Cows in Accounting"

By Herbert F. Taggart

The Accounting Review, Volume 28, No. 3, July 1953

[fol. 227] At page 313, Professor Taggart states:

"The sacred cow in accounting is a belief or doctrine which is accepted without critical analysis and which, like the Indian cow, it is sacrilege to destroy. It is based, not on logic or on any necessity of record keeping or financial presentation, but merely on tradition or blind acceptance of what has been.

"Unlike the universal (among Hindus) acceptance of bovine sacredness, no accounting sacred cow is the subject of universal acceptance among accountants. Each accountant has his own collection of such irrational beliefs. Some are more widely held than others. Since the assortment of such doctrine is so heterogenous and so personal, perhaps the best definition of the sacred cow in accounting is a purely personal one: It is what you believe and I don't, or vice versa."

[fol. 228] At page 314, Professor Taggart states:

"Accounting textbook writers are as apt to own a herd of sacred cows as are other accountants. No one is immune. Among the illogical aspects of textbooks, none is more irritating to the conscientous teacher than the two extremes of attitudes toward the multiplicity of solutions to nearly every accounting problem. Some textbooks blandly ignore the fact that there are nearly always several approaches to any given accounting situation."

[fol. 229] At pages 314-315, Professor Taggart states:

"A sacred cow which leads us all astray from time to time may be designated as the belief in objectivity as an infallible accounting guide. The motto is: 'things are what they seem to be.' Followers of this doctrine perform accounting operations in accordance with outward appearances, with little or no inquiry into inner truths. Familiar examples of accounting practices based on this tenet are the evaluation of assets acquired through security issues at the par or stated value of securities, and the treatment of treasury stock as an asset.

"The area of cost accounting is peculiarly subject to this approach. Cost assignments and allocations are all too often made on the basis of obvious factors, easily noted and measured, without an examination of the truly relevant facts.

* * * * * * *

"So important is this point that another example seems desirable. In the field of distribution cost analysis are found some of the most perplexing of cost accounting situations. Joint costs are particularly prevalent. In the allocation of salesmen's compensation among products and customers it is generally agreed that time spent, if ascertainable, is an important factor. The measurement of time of salesmen is a matter of no small difficulty, and resort is therefore had to other expedients, such as the unweighted number of calls in the case of customer analysis or gross margin in the case of product analysis. Where salesmen are paid on a commission basis, almost all writers on the subject seize upon the commissions as the ideal basis for cost allocations. It is assumed that outward appearances furnish an entirely adequate basis for solving a complex problem.

[fol. 230] "Assume, however, that the Universal Coffee Company, which pays its salesmen a flat 5% commission on all sales, follows the policy of requiring them to call on all grocers, however large or small, and wherever they may be found, in order to get truly universal distribution for its 'Universal' brand of coffee. Salesman A calls on Joe's Supermarket, located in the middle of town. Joe is an old customer. He does not need to be educated in the merits of

Universal, and needs no merchandising assistance. He buys 1,000 pounds a week at 50¢ a pound, and A's commission is $25. His weekly call takes 15 minutes, including travel time. The Hayseed Corners Grocery, on the other hand, is located ten miles outside of town, and five miles off the main road. Its capacity to sell coffee is limited and the proprieter is indifferent to the advantages of Universal. After A has driven out to this store and has spent a full half hour showing the storekeeper how to display Universal Coffee to better advantage, the weekly order is ten pounds, and the commission is 25¢. Query: Does it really cost 100 times as much to obtain the business from Joe's Supermarket as that from Hayseed Corners? The answer clearly is in the negative, and yet this is the result which is produced when the salesman's compensation is allocated by the obvious method."

[fol. 231] At page 319, Professor Taggart states:

"The final sacred cow here to be discussed is the aura of infallibility which sometimes, intentionally or otherwise, surrounds the accountant and his works. The notion is that accounting figures represent the ultimate in truth and reliability, that since accounting statements always balance to the penny they must be right, that 'actual cost' is really 'actual cost', and not merely an informed guess. Probably most accountants themselves would disclaim any such belief, but they are sometimes guilty of a pontifical attitude toward their work which encourages the spread of this opinion among the laity. They often talk and act as if they believed in the concept of infallibility."

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendant

Deposition of Otto F. Taylor—Filed February 13, 1959

The deposition of Otto F. Taylor, called by the defendants for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe, a notary public within and for the County of Cook and State of Illinois, in Room 257, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Monday, April 28, 1958, at 2:00 o'clock, p.m.

PRESENT:

Mr. Bertram Long, and Mr. Elliott Woolley, on behalf [fol. 2] of the Government; Mr. Stuart S. Ball, and Mr. H. Blair White, on behalf of defendants The Borden Company and Belmont Dairy Company;

Mr. Edward L. Hart, Jr., Mr. John P. Stevens, and Mr. Robert Havemeyer, on behalf of defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.

[fol. 3] Mr. Long: I think in the beginning let the record show that this is a discovery deposition being taken by Borden Company and Bowman Dairy Company in United States of America against the Borden Company, et al, Civil Action No. 51 C 947.

The proposed direct testimony of the witness, Mr. Taylor, is contained in the proposed plaintiffs' rebuttal as to Bowman Dairy Company and The Borden Company.

OTTO F. TAYLOR, having been first duly sworn, deposeth and saith as follows:

Cross-examination.

By Mr. Ball:

Q. Mr. Taylor, you have with you, I take it, the draft of the rebuttal pre-trial order prepared with respect to The Borden Company by the Government?

A. Yes.

Q. Have you read over the draft of that stating what you would testify beginning with Paragraph 14 on Page 26?

A. Yes.

Q. Now, in preparation for the testimony that is set forth in this draft of a pre-trial order and testimony you are about to give, by whom were you reached with refer-

[fol. 4] ence to your testimony here in this case?

A. Well, the first person I talked to was Mr. Woolley.

Q. Can you fix the date of that conversation?

A. Sometime about a year ago.

Q. Can you be any more definite than that?

A. Sometime in May of 1957.

Q. Had you had any previous correspondence with Mr. Woolley or anyone else for the United States?

A. Yes, I think correspondence setting up an appointment, I think, for some day.

Q. That letter was over whose hand?

A. Well, I do not think I recall that.

Q. Whether it was Mr. Jinkinson's or Mr. Woolley's?

A. I do not recall.

Mr. Stevens: Mr. Taylor, could you speak a little louder, please?

By the Witness:

A. I do not recall whose signature it was.

By Mr. Ball:

Q. Do you recall what the letter said about the nature of the problem that was confronting the Government?

A. No.

Q. Where did Mr. Woolley see you?

A. In my office in New York.

Q. In New York City?

[fol. 5] A. Yes.

Q. And how long a visit did you have with Mr. Woolley?

A. About an hour.

Q. Did he discuss with you your appearance as a witness in this case?

A. Yes.

Q. And you agreed at that time to become a witness?

A. At the end of the conversation I agreed.

Q. What did Mr. Woolley say to you about the case at that time?

A. Well, he told me in general that it was a case that had involved issues other than Robinson-Patman issues and that at the present time the issues were Robinson-Patman issues. He told me also that there were problems connected with the cost of serving different store customers of The Borden Company and The Bowman Company, different types of customers, and it had to do with different elements of cost, particularly the compensation of drivers, and other costs connected with the delivery of milk to stores in the Chicago area.

Q. Did he indicate to you that he questioned the allocation of costs with respect to the compensation of drivers?

[fol. 6] A. Yes. He told me that he disagreed with the defendants' calculations of cost differences and the bases of those calculations.

Q. And what did he explain the reason for his difference was?

A. Well, he spoke of more than one difference. He spoke of a difference in Borden's case and the case of The Bowman Company, and he also explained the difference in the cost of transporting the goods, and also differences in the costs of serving the customer after the goods had been transported.

I believe those were the categories.

Q. Did he express to you his criticisms of the Borden cost studies and of the Bowman cost studies at that time?

A. Yes, yes, I think he did.

Q. Did he tell you something of the facts of the case?

A. Yes.

Q. And do you recall what he said as to the facts of the case?

A. Well, he explained to me in general and also submitted to me certain papers that he had.

Q. He submitted to you at that first meeting certain papers?

A. I assume at that first meeting. Then I saw him at [fol. 7] another meeting not so long ago. I am not certain whether it was at that meeting or a meeting in the early fall, in September, I think, that he turned over to me certain papers that would give me a view of the problem.

Q. Do you recall what those papers were?

A. The titles of them I do not recall. I do not recall the exact titles.

Q. Well, describe the papers as best you can. Put it this way; first, do you have any list or record of the papers that were furnished you?

A. No.

Q. Well, then, will you describe what it was that he gave to you?

A. I had a deposition of Mr. Bergfield, who I think was an expert testifying for the Bowman Company. Then there was an exhibit having to do with the method of cost calculations for the Bowman Company.

There was a transcript of testimony by a Borden employee by the name of Malone, M-a-l-o-n-e.

There was a description of costing methods, including time study that was made by the Borden Company.

Q. Do you recall the physical appearance of that particular report?

[fol. 8] A. I believe that that report was a photo offset report.

Q. Do you recall what kind of a cover it had?

A. No, I don't.

Q. Did it have a black cover?

A. I don't recall that. I think I would know it if I saw it.

Q. Do you recall if it had numbered paragraphs in it?

A. Yes, yes, I believe it did.

Q. Did it have any exhibits with it, documents?

A. Documents? No, I do not recall that.

Q. You were not furnished any of the reports made by the time study engineers?

A. No.

Q. Or any of the basic reports which were summarized in the documents handed to you?

A. No.

Q. Did you at any time ask to see that basic data?

A. No.

Q. Did Mr. Woolley give you any reports or comments of his own in writing?

A. Yes.

Q. In what form were those?

A. That was a carbon copy of a memorandum of Mr. [fol. 9] Woolley's in yellow paper, thin yellow paper, regarding his analysis of these cost studies, either both of them or one of them, I do not recall now which.

Q. Did that contain statements as to his knowledge or understanding of the facts?

A. Yes, yes, his view of them, I think.

Q. Well, did it contain statements of fact or only expressions of opinion, do you recall?

A. I think that was statements of opinion, a summary of his reaction to these cost exhibits.

Q. What did he ask you to do with reference to that report?

A. To read it.

Q. How big a report was that?

A. Oh, several pages.

Q. Twenty pages?

A. I should think less than that.

Q. Fifteen?

A. No, more than that.

Q. Single spaced?

A. Single spaced. That is just a recollection. It might have been different.

Q. Do you recall what was said in that memorandum?

A. Not specifically, no.

[fol. 10] Q. Well, to the best of your recollection, what did it say?

A. I have very little recollection, Mr. Ball, about that. It has been so long since I read it. It would be difficult for me to put into words.

Q. Now, do you recall——

A. I think I ought to answer your question.

Q. Yes.

A. (Continuing) I really ought to. I recall that Mr. Woolley was of the opinion that in separating costs of transportation between customers it was his opinion that using vehicle stops as a method of allocation was not the best method.

At another point he was of the opinion that summing up commissions paid on volume with compensation to drivers paid on time and dividing the whole on the basis of time was not the best method of dividing compensation of drivers, and that the two should be separated.

He also was of the opinion that the compensation of the drivers should be considered under two heads, one the service function and the other transportation function. That is as definite as I can be.

[fol. 11] Q. Did he raise any question about the classification of customers?

A. I do not recall that that was in there.

Q. Did he raise any question about the allocation of costs as between classes of customers, other than the ones you have mentioned?

A. Those are the only ones I recall now at this instance.

Q. Did he give you any documents purporting to be analyses of the drivers' functions?

A. Yes, yes, there was one that I believe was titled Bergfield Exhibit No. 1, there was a list of functions, a series of, oh, I think maybe twenty or twenty-two functions, all but two of which were common to all classes of customers, and two of which were applicable only to certain customers, classes of customers.

Q. You do not recall whether that was prepared by Mr. Woolley or whether that was——

A. No. That was a document with respect to which no one was able to discover who prepared it or when.

Q. Who prepared it or when?

A. That is right.

Q. Did he show you any computations or exhibits that he himself had prepared?

[fol. 12] A. Yes.

Q. He did?

A. Yes.

Q. Did he leave copies of those with you?

A. Yes, temporarily. I had them for a short period.

Q. Do you recall what those documents were?

A. Yes, they were three each; one supplemental schedule of Bowman's exhibits and three supplemental to Borden, and they were in heavy brown board covers showing certain schedules and calculations applying costs which had been introduced to evidence a result, and more than one result—different alternative results.

Q. Now, what other documents did he submit to you for your review in connection with your testimony?

A. I think that covers the lot.

Q. Now, all of these were given to you prior to the preparation of the testimony that appears in this draft of a rebuttal pre-trial order?

A. Not all of them. The later ones that we have just been discussing I saw later.

Q. When did you see those?

A. Oh, fairly recently. This year, in this present year. [fol. 13] Q. Now, did you prepare this draft of your testimony that appears beginning at Page 26 on the Borden order?

A. Oh, yes.

Q. Going back to this second visit you had with Mr. Woolley, that also took place in New York, did it?

A. Yes.

Q. And how long a visit was it?

A. Well, it extended over lunch. I know we had lunch together. Including lunch, it must have been a couple of hours.

Q. What other meetings did you have?

A. None.

Q. You had only two meetings, one of which took place in May of 1957, and the other sometime in the fall of——

A. September, I think.

Q. (Continuing)—September of 1957? The first one lasted three or four hours, is that it?

A. No, I do not think so.

Q. Or about an hour?

A. About an hour.

Q. And the second meeting lasted about two hours?

A. I should think so.

Q. Now, you do not recall when it was, whether it was

the first or second meeting that these documents were [fol. 14] given you?

A. I do not think they were given to me—which documents?

Q. The ones you have described, the various documents.

A. Well, they were at different times. They were documents given to me in the beginning.

Q. At the very first meeting?

A. In May.

Q. Which ones were those, if you can identify them?

A. Well, they would be, I think, the Malone testimony, the Bergfield testimony, and the Woolley opinions or memorandum.

Q. Yes.

A. I think that is about all.

Q. They were separate? There were separate memoranda, were there not, from Mr. Woolley, in respect to Bowman and Borden?

A. Yes, I think they were. Then these later exhibits, detailed calculations with figures and so on, came along sometime in 1958, which I had just temporarily. I did not have time to look them over carefully.

Q. Had you previously returned the other documents, or are they still in your files?

A. No, they were all returned.

[fol. 15] Q. It may have been possible even then that you may have had some of those documents other than these calculations at different times and not had them all together at the same time?

A. That is right, yes, because I was instructed to pass them on to other witnesses for their examination.

Q. Did you have any conferences with the other witnesses?

A. No—well, I had no conferences with them; there were questions about dates, and so on, but not discussions of issues.

Q. And who were the other witnesses that you understood?

A. Taggart—Dr. Taggart and Mr. Sawyer.

Q. Were there other witnesses tentatively suggested to you, if you recall?

A. No.

Q. Now, turning to the testimony as it appears at the beginning of Page 26 of the Borden order, when was this first drafted?

A. Well, I cannot be exact about that, but I should have to say that it was between late in 1957 and——

Q. It was after your second conference with Mr. Woolley? [fol. 16] A. Yes.

Q. Had you prepared any analysis for Mr. Woolley at the time of your second conference in September of '57?

A. Will you ask that again, please?

Mr. Ball: I think we had better read it.

(Question read by the reporter.)

By the Witness:

A. Well, while he was there he asked me if I would not just dictate something I had said. He liked the way I said it. I dictated it at that time and wrote it out for him at that time.

By Mr. Ball:

Q. Do you have a copy of that document in your files?

A. No. I believe it is incorporated in here. It is in here (indicating). I do not think I have the original draft of it, no. It was drafted and then changed for grammar and punctuation and incorporated in here.

Q. Well, now, what was the next step then to the drafting of this testimony, as best you recall?

A. Well, I think that was just about in this form finally.

Q. In other words, it started with this memorandum that [fol. 17] you dictated?

A. Well, with that, oh, yes, and then I had other materials, as I said, before me at that time, these exhibits which I drew up, Mr. Woolley's memorandum and——

Q. Well, if you will look at Pages 26 up through 32 in the Borden order I want to find out the sequence of the drafting of that material, the selection of the wording, and what was included, and the rest of it.

A. Oh, yes, there was an original draft which I sent out to Chicago.

Q. Can you remember——

A. (Continuing) And some correspondence regarding it, and then a redraft, that is correct, there was.

Q. You have that correspondence in your file, I assume?

A. I believe so. It would be in New York. I have it in my file anyway, I think.

Q. Yes.

A. Yes; oh, yes, I would have that in the file.

Q. And did Mr. Woolley make suggestions in that correspondence about the drafting of the testimony?

A. Oh, yes, we had some discussions and some disagreement about wording.

Q. Well, in the case of the disagreement, did you [fol. 18] finally agree with Mr. Woolley?

A. Yes, yes, we finally came to an understanding. Finally I was able to say it my way.

Q. Now, looking at Page 26, the paragraph that is numbered 14, especially at the second sentence; is that your wording in that second sentence?

A. You mean starting in "In regard to"?

Q. Yes.

A. "Regarding the principles underlying——"

Q. I am calling attention to that phrase like, "——properly conceived system of distribution allocation."

A. It does not sound like me. I probably lifted that some place.

Q. Or it may have been suggested from Mr. Woolley?

A. It could have been.

Q. As a matter of fact, the problem that confronted you wasn't a system of distribution accounting at all, was it? It was just an analysis made on a single time basis, is that correct? I am speaking of the Borden order.

A. Well, yes, I think so. I know what this intended to mean. Originally, if I started off cold I would not have said it that way.

[fol. 19] Q. Well, how would you have said it?

A. In the making of a Robinson-Patman cost analysis.

Q. You are testifying——

A. Instead of all those others words I would have said in a Robinson-Patman action. I would have used fewer words but it would mean the same.

Q. Did you at any time in your correspondence or dis-

cussions with Mr. Woolley ask him to provide you with further facts?

A. No.

Q. Did you point out any fields in which further facts would be helpful?

A. No.

Q. Did you know that all of the basic data behind the Borden cost study, the reports of the time study engineers, and all the rest of it was available to the Government?

A. I know nothing—I knew nothing about it at all.

Q. Have you at any time been shown the proposed testimony of Professor Taggart and Mr. Sawyer?

A. Only recently in connection with this particular proceeding.

Q. That was after your testimony was drafted, is that [fol. 20] correct?

A. Yes—well, I mean this whole thing came to me in one bundle.

Q. You wrote an article, did you not, in the June, 1957 copy of what is entitled The New York Certified Public Accountant, the article being entitled, "Cost Accounting Under the Robinson-Patman Act"?

A. Yes.

Q. Now, in that you stated on Page 387 in Volume XVII, Issue No. 6, and I quote:

> "An accountant as a fact-finder and an analyst may find himself involved in almost any anti-trust proceeding. He is more likely to be concerned with the application of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, than with any other subject in this field."

You said that, didn't you?

A. That sounds familiar.

Q. And I am interested in the words "fact-finder." Really the function of an accountant in making an analysis is primarily to be a fact-finder of the relevant facts, isn't it?

A. Yes.

[fol. 21] Q. And the answers that he comes up with depend upon the facts of each particular case?

A. Yes.

Q. Now, over on Page 389 you stated, I believe, and I quote:

> "Where prices differ according to the class of trade to which the buyers belong, or other factors such as the volume of their purchases, it is useful to analyze sales volume according to customer groups."

Now, that is what you said?

A. Yes.

Q. And that represents a point of view that you continue to retain?

A. Yes, sir.

Q. And you found nothing in the Borden study that was improper in any way in the classification of customers for study, did you?

A. I was not asked and did not consider the classification of customers at all in the Borden case.

Q. Now, I call your attention on Page 391 to the following from your article:

> [fn. 22] "The words 'cost of manufacture, sale or delivery' in the cost proviso of Subsection 2(a), seem to include every sort of cost actually incurred. However, opinions may differ as to whether an item is a cost at all. For example, whereas some economists regard a fair return on capital invested as a cost, many accountants including the Commission's accounting staff, think it is not a proper item of cost justification."

Now, you said that, didn't you?

A. Yes.

Q. What is your personal opinion?

A. I do not think it is a problem for Robinson-Patman cost purposes. I agree with trial examiner Kolb who has just come down in the famous Thompson Products case and said so.

Q. Yes. You are familiar with the decision of Kolb in that case?

A. Indeed I am. Very much. I am very much interested. I read the whole case.

Q. You were a witness in that case?

A. No, sir. I am very much interested in the automo-

[fol. 23] bile parts business, and that is the biggest thing in automobile parts.

Q. Now, in the Thompson Products case the trial examiner found that while there were some differences in the variances between the proof and some of the differences in some of the brackets, overall it was sufficiently justified?

A. Now, are we going to discuss that case? I want another day for it.

Q. No, I am asking your opinion.

It is true, is it not, that in a cost justification problem it is not defined in exact justification on the dollar in each element of the bracket, but in approximation?

A. It must be within the meaning of whatever is due allowance, whatever that means. The difference must be within the scope of due allowance, whatever that is.

Q. And with respect to that you have stated in this article from which I just read, the following:

> "There is probably no mathematical formula for measuring due allowance. It is certainly not subject to slide rule calculations. To be workable, therefore, it should be subject to reasonable tolerances."

[fol. 24] Now, does that represent your point of view?

A. Yes, sir, I believe it does.

Q. Also you said in the same article on Page 394:

> "If the price differences reasonably approximate the cost differences they should be considered as meeting the statutory test of making 'only due allowance'."

A. Yes, sir.

Q. And that represents your present point of view also?

A. Yes, sir.

Q. Now, in this article you also made the statement which appears on Page 392:

> "Cost justification does not require balanced or inclusive costs because it is directed to a special object—showing differences in costs which are caused in the specific way. The costs which are not differentiated in this special way may be ignored with gain in time and clarity."

That represents your present point of view?

A. Yes, sir.

Q. By that you mean that if there are overhead costs [fol. 25] which are not readily allocable, that it is quite proper to disregard those from the standpoint of making an analysis?

A. Well, if they are unimportant or if they are of a character that do not produce differences between classes of customers. For instance, if the costs are costs that are common to all customers, say manufacturing costs, where the only distribution costs differentiate between customers you can ignore manufacturing costs.

For instance, in the dairy industry you can ignore pasteurizing costs because it is all the same for all customers per unit of product. That is what I mean. You can ignore all of those things that are common on a volume basis.

Q. For that reason you would regard it as entirely proper that the Borden study did not include manufacturing costs?

A. That is right. That is what I mean.

Q. And did not include any costs up to the time that the product was ready to be loaded onto the truck?

A. Oh, beyond that; up to the point where there is a customer service, at that point where all customers are alike and from that point on you can differentiate one customer [fol. 26] from another. But up to that point it is all the same.

Q. So you would regard the fact the Borden study was made on that basis was entirely proper?

A. Yes, I would say so. In fact, I think that it is economical and efficient to eliminate that. In fact, in most studies it eliminates most of the work to just concentrate on those factors where there is a difference between customers that results from it.

Q. And that is determined by the facts in the case?

A. In each case. Each case on its own.

Q. And what you look at then is to concentrate your study on those particular elements of cost which the facts indicate represent a difference of treatment between customers?

A. That is right.

Q. Now, generally in this field of cost analysis you recognize a difference between direct and indirect costs, do you not?

A. Oh, yes.

Q. Now, I am going to read you what you said here in this article on Page 392 and ask you if that does not describe the difference, and I quote:

> [fol. 27] "Analysis of the cost of selling, administration, warehousing, delivery and advertising will disclose those which are incurred directly for certain products, territories or classes of customers, and those which are incurred for more than one of them.
>
> "Costs are direct if the amount spent may be readily assigned to one of these categories; otherwise, they are indirect."

Now, that represents the proper analysis and difference between direct and indirect?

A. Yes.

Q. In other words, another word for indirect costs may be joint costs?

A. Yes, that is another way of saying it.

Q. Now, you talk about, as an illustration of when it becomes difficult to assign costs directly, and you give this illustration, and I quote again from Page 392 of your article:

> "For example, where the seller who distributes through wholesalers engages in missionary work with retailers, the circumstances must be thoroughly under-[fol. 28] stood before assigning the related costs. If the missionary effort is directed to building up total sales volume through all customers, the costs are indirect, i.e., applicable without reference to any particular class of trade."

Now, that illustration you still feel is a proper one?

A. Oh, yes.

Q. Now, when you have an indirect costs and there are some factors or facts, rather, that make it apparent that they may be compared with different weight with respect to different classes of customers or products, the problem

becomes one of finding the proper divisor of those costs, does it not?

A. Yes, sir.

Q. Now, I read what you said at the bottom of Page 392, and top of Page 393:

> "Where costs are incurred for two or more product or customer classes, it frequently becomes desirable to compute cost rates which can be applied to the number of units in portions of the mixed aggregate. Finding such cost rate is an example in division in which [fol. 29] the divisor is the total number of units, the dividend, the amount expended, and the quotient is the rate per unit.
>
> "Such dividends are likely to be the aggregate costs of performing certain functions, and the divisors those available statistical units which are the most logical measures of the differences in those costs."

Now, that again expresses your point of view?

A. Yes.

Q. Now, these measuring units to be logical must be those that are shown by the facts of the particular case to have a close relationship or a rational relationship with the subject matter to be proved, is that correct?

A. That is right.

Q. Now, the selection depends upon a finding of the facts with reference to the surrounding circumstances bearing on the rationality of that connection?

A. Yes.

Q. Now, I call your attention to what you said on Page 393 and I quote:

> "Among the many types of units frequently used in allocating joint costs are orders, shipments, invoice [fol. 30] items, shipping units, weight, bulk, floor space, time, distance and number of customers."

Now, all of those are conceivably proper measuring units or divisors of indirect costs?

A. In applicable cases.

Q. And the applicable case is determined by which one of

those particular factors bears the most logical relationship to the problem to be solved?

A. Yes.

Q. And that again depends upon a determination of the facts?

A. Yes, sir.

Q. And that determination becomes a pretty common sense appraisal of the relevance and rational connection between the facts?

A. I would say it is a matter of judgment largely.

Q. Largely of judgment; but it must be based upon the facts themselves?

A. Based upon a knowledge of the facts.

Q. Of the facts. In other words, there isn't any such thing as sitting outside a particular case and saying that abstractly one unit should be used as against another?

[fol. 31] A. In this area there are few "musts."

Q. It all goes back to the facts of the particular case?

A. (Witness nodding head.)

Q. Incidentally, at no time, Mr. Taylor, were you shown the final pre-trial order entered with respect to the cost defenses of either Borden or Bowman, were you?

A. I believe not.

Q. Now, unlike a system of cost accounting, a cost analysis once made has validity both, shall I say, prospectively and retroactively, isn't that correct?

A. Until it can be shown that conditions have changed to the extent making it invalid.

Q. Yes; I read to you what you said at Page 393 of your article:

> "Once a cost justification study is completed, its conclusions need not be demonstrated again and again because those conclusions remain valid until the business organization and methods to which they relate have substantially changed.
>
> [fol. 32] "In this respect, cost justification studies differ completely from the kind of costing useful in financial accounting and reporting where cost systems produce periodic statements."

You adhere to the point of view there expressed?

A. Yes.

Q. In other words, if you make an analysis in one year you can expect that in general the results of that will have been valid for some time past and until some time in the future unless there is a showing of significant change in circumstances?

A. Yes.

Q. Now, you were, I believe, a member of the so-called Taggart Committee appointed by the Federal Trade Commission, of which Professor Taggart was the chairman which prepared a cost justification report?

A. Yes.

Q. Now, I hand you what has previously been marked as a copy of this report as Taggart Deposition Exhibit No. 1 for identification, which is a publication of Commerce Clearing House, and I ask you if this is the report to which you were a subscriber?

A. I signed it.

[fol. 33] Q. Are you in agreement with the positions taken in this report?

A. Yes.

Q. Including the positions taken in the appendix to the report?

A. The appendix was a writing of one of the members which was added as being useful. This was Mr. Ed Kelly's writing, and Dr. Taggart thought it might be a good idea to add it on, so it was added.

Q. Well, did you review it before it was added?

A. Well, I saw it. It seemed innocuous. I had no objection to it being added.

Q. Well, do you have any differences in point of view?

A. I have not read it recently.

Q. Well, I call your particular attention here——

A. Ed Kelly is a good man. Ed Kelly is a good man. He handled the Standard Brands case when they were up before the Commission, and that was a very tough case.

Q. This is Mr. Kelly who used to be with the Commission?

A. No. He is with Macey. He is a good man. I imagine it is a good writing, too. I do not want to minimize it. I

just say—I mean, I had little to do with it beyond saying I had no objection to it being added on.

[fol. 34] Q. Well, may I summarize by saying with respect to the report itself, with that you are in complete agreement with what the positions taken there were?

A. Oh, yes. This was unanimous, of course. We had no minority.

Q. And you had no differences between yourselves?

A. Well, we had plenty of them, I assure you.

Q. But, I mean, as to the matter that was put into this report?

A. No; we were in general agreement, yes.

Q. Would you say there was anything put in here which you would not adopt as your own opinion?

A. No.

Q. Well now, turning to this appendix, then, I am going to read you a few passages here to see if these express points of view with which you are in agreement:

> "In defining a function——"

and I take it we mean a unit of cost——

> "—a distribution function may be defined as an operation or activity at the lowest practical level of supervision for which costs can be isolated and collected."

I take it you are in agreement with that?

[fol. 35] A. It sounds good.

Q. Now, there is another statement made in this appendix, and I quote:

> "Since methods of organization and operation differ among companies and industries, distribution cost functions also differ."

I take it you are in agreement with that?

A. Yes.

Q. Now, in this report, shortly after the passage I have quoted, there is a list of what might be considered as distribution cost functions of an integrated manufacturing company, and it lists eight different distribution cost functions. Are you familiar with those?

A. Yes.

Q. And that is a proper and a fair listing?

A. I think that looks all right.

Q. Now, these various functions you defined afterward —and I take it that the definitions of those functions are——

A. As far as I recall, those are good definitions.

Q. Now, I call your attention to this passage from this appendix to see if that represents your point of [fol. 36] view:

> "After ascertaining the direct costs it remains to assign the indirect costs. These costs are collected as totals of functions not chargeable directly.
>
> "Assignment of these indirect costs is done by measuring the activity or output of the function in terms of unit of functional service which can be counted or measured, and then applying to each business segment the amount of the functional costs which is in proportion to its use or responsibility for the units of functional service."

I am going to pause there. That sounds like a mere statement of general principles in which you are in complete accord?

A. Yes.

Q. It goes on to say:

> "A simple example makes this process clear. If the function is personal selling, one possible unit of functional service in a customer analysis may be sales costs. If the customers are divided into Classes A, B [fol. 37] and C, and if ten per cent of the calls are made on Class A, 30 per cent on Class B, and 60 per cent on Class C customers, then the three classes share the cost of personal selling in those proportions."

Now, that seems also to you as a very reasonable method of allocation under the facts set forth there?

A. Yes.

Q. Now, the appendix goes on to say this:

> "At the outset caution should be exercised with respect to over-emphasis on the distinction between

direct and indirect costs. This distinction should not be made for minor items of cost or for those where treatment of potentially direct items by a satisfactory application of the indirect procedure will produce completely reliable results."

Now, Mr. Taylor, I believe that is more or less in agreement with a statement you made earlier here and represents your point of view?

A. Yes.

[fol. 38] Q. It goes on to say:

"Substantial elements of direct costs are ordinarily so designated and reported in the original bookkeeping process. Establishment and maintenance of the necessary bookkeeping routine for isolating all direct costs is burdensome and justified only where amounts here involved are appreciable and satisfactory results cannot be obtained by other and less expensive methods.

"In many cases the indirect functional approach using an uncontroversial unit of function service will provide acceptable results."

Now, I take it that you are in agreement with that?

A. He is talking about something different than we are dealing with today entirely. He is talking about a system of distribution costs which is a nice thing to read about——

Q. Yes.

A. But it has nothing to do with what we are talking about.

Q. But what you are saying——

A. It may make a good romance story but it has nothing [fol. 39] to do with what we are talking about.

Q. What you are saying in that particular passage, he is speaking about setting up a system of day-by-day periodic accounting reports?

A. He is talking about his job as a comptroller, see? This is useful. It is general information like you might read a romance story tonight, it is fresh for your mind, it is useful to read a lot of stuff, but——

Q. But that particular quotation——

A. It is a good thing to add to this report.

Q. But it has little application——

A. It is nice reading, but it is not connected with our study at all.

Q. But a particular analysis——

A. I say, he is a good man. This is good stuff, but it is not Robinson-Patman stuff.

Q. Now, I come to something that I believe is Robinson-Patman. Let me read it to you and see if you are in agreement with this:

> "Functions vary widely in their closeness to the business segments being costed. Some such relationships are very close and the appropriate measuring [fol. 40] factor (the service unit) is easily identified and perhaps easily counted in relation to the segments."

Now, I take it that is a true statement and in accordance with your opinion applicable to a special study?

A. Yes, I would think so.

Q. I quote further:

> "The relationships of other functions to the costing segments are more remote and the choice of the service unit which will adequately measure a given relationship is of greater difficulty.
>
> "In many cases more than one service unit might be chosen. The precise choice will depend upon two main considerations; first, which service unit most closely approximates satisfactory measure of benefit or activity in terms of rational analysis;
>
> "The second, which service units can most readily and economically be counted both in total and in terms of the costing segments."

[fol. 41] Now, I take it again that you were in complete agreement with that statement in the way in which an analysis should be made?

A. That is right. That applies to both bookkeeping and special analysis.

Q. Now, the appendix goes on to say:

> "Different service units will yield different dollars and cents results, and a particular service unit should not be chosen merely because it maximizes cost differences.

"Where the choice is otherwise a matter of indifference, however, there can be no objection to the choice of method which produces the most desirable result."

I take it you are in accord with that?

A. Oh, indeed, indeed. I have been saying that today. That is your duty.

Q. Now, in this appendix it ends up taking the eight types of distribution functions and gives a list, sort of a tabulation of possible service units. I ask you if you are familiar with that? It starts with the word "transportation" and goes down.

[fol. 42] I ask if you are in general agreement that these are suggestive of possible service units that could be used in connection with the functional costs?

A. I think all of them you could think of. He has various ones that could be used.

Q. And there are——

A. As I said before, it depends upon the circumstances of the particular case.

Q. That is right. You cannot dogmatize about it?

A. No.

Q. And you see nothing in that particular summarization of possible service units with relationship——

A. It says here——

(The witness read inaudibly.)

By Mr. Ball:

Q. Well, going down generally, I think you find nothing to disagree with there?

A. No, no. I think it is fairly comprehensive.

Mr. Ball: I wonder if we might save time if we might have a brief break.

(A short recess taken.)

By Mr. Ball:

Q. Mr. Taylor, altogether in preparation for your testimony here, how much time do you estimate that you [fol. 43] have spent?

A. You mean in preparation immediately or from last May of last year?

Q. From last May of last year?

A. You want me to guess at that?

Q. Well, the best informed guess you have. You know you spent an hour with Mr. Woolley and——

A. Well, I could not say. I would not want to say on that because this gets into the record here.

Q. Well, then, I take it you will indicate the maximum tolerance?

A. Oh, yes. Say not more than a hundred hours.

Q. You spent one hour with Mr. Woolley the first time and two hours with him in preparation for the report?

A. Yes, and I have been doing some study and research.

Q. That study, did that go outside of the material that was furnished you by Mr. Woolley?

A. Yes.

Q. Did it?

A. Yes.

Q. What other material did you take into account?

A. Well, I looked into the literature of this subject to quite a considerable extent.

Q. Now, by "literature on the subject," what do you [fol. 44] mean?

A. The Senate Committee Reports and the House Judiciary Committee Report on the Robinson-Patman Act; the debates in the House and in the Senate on the Robinson-Patman Act; the textbooks on the subject of the Robinson-Patman account costing.

Q. Which would include what ones—Mr. Austin, Cyrus Austin Reports?

A. Cyrus Austin, and Mr. Patman.

Q. Mr. Patman's own?

A. Yes.

Q. What else?

A. The various books on cost accounting that have reference to the subject.

Q. Do you recall any of those by name?

A. Yes, yes; Neuner?

Q. How do you spell that?

A. N-u-e-n-e-r, and Blocker.

Q. B-l-o-c-k-e-r?

A. Yes; Dohr, Jim Dohr, D-o-h-r.

Q. D-o-h-r?

A. Yes.

Q. Now, was there any other literature to which you made reference in the preparation of your testimony here? [fol. 45] A. Well, I reviewed generally the decisions in various Robinson-Patman cases over at the Federal Trade Commission.

Q. None of which involved the milk industry, did they?

A. No, none.

Q. Did you read any literature with reference to cost studies in the milk or dairy industry?

A. No.

Q. Have you ever made any studies of the dairy industry yourself?

A. No.

Q. Have you any personal acquaintance with the facts concerning the operations of dairies in distribution of milk?

A. No special knowledge, no.

Q. Only somebody that has milk delivered to their door?

A. As a purchaser.

Q. And you have purchased by home delivery?

A. No, no; we buy both at the store and at home.

Q. Have you written any other articles about the Robinson-Patman Act other than the one from which I have quoted earlier here?

A. Well, my address to the Anti-Trust Bar was pub- [fol. 46] lished. You may have seen it.

Q. When was that, Mr. Taylor.

A. That was at the meeting in January of 1957. That, of course, has been published, as has all the Anti-Trust Bar symposia been published. I do not think you will find anything at variance with the article you so studiously reviewed.

Q. No; well, whatever you said to the Bar at that time I take it still represents your point of view?

A. Yes.

Q. Do you recall any other published articles on the subject of Robinson-Patman Act?

A. Of mine?

Q. Of yours.

A. No. There are no other.

Q. Now, will you turn specifically to the draft of your testimony beginning at Page 26, with reference to the Borden order, and I call your attention to Paragraphs A, B and C running over to more than halfway through Page 29, and I ask you if there is anything in those paragraphs that particularly refer to the Borden study, or isn't it a fact that what you have said in those three paragraphs represent general principles of the kind that we have already discussed?

[fol. 47] A. You will have to give me time to read this.

Q. Yes. That is fine.

(Witness examining document.)

By the Witness:

A. First with respect to Paragraph A there is nothing in there that applies any more to Borden than to any other Robinson-Patman proceeding.

By Mr. Ball:

Q. And this was not intended to be a criticism of the Borden cost study as it was presented to you?

A. It is general.

Q. Yes.

A. It applies to the Borden study only as it would apply to any.

Q. You do not know of any respect from which the Borden study departs from those principles, do you?

A. This does not have anything to do with that at all. This is just a general statement that does not apply to any particular set of facts. This applies to any Robinson Patman study. I am speaking of A now.

Q. Isn't the same true of B now?

A. The same is true of B. It has to do with the techniques of Robinson-Patman cost analysis generally.

[fol. 48] Q. Yes, and you cannot point to anything that appears in Paragraph B that applies as a criticism of the Borden studies as they were presented to you?

A. As to Paragraph B, that is correct.

Q. Now, isn't that same true with respect to Paragraph C?

A. I understand with respect to C the situation is differ-

ent. I was informed that the cost of selling and negotiating contracts of sale by Borden to the large chain organizations was not reflected in their costs, so that as far as Paragraph C is concerned, this would state a different principle than was followed there.

Q. Well, now——

A. If that is a fact, assuming that is a fact.

Q. And your last sentence in that paragraph indicated that that is merely based upon an assumption of the fact and not upon a statement that that would necessarily be applicable to the Borden study?

A. IF such costs, and with the emphasis on the "if"——

Q. Yes.

A. (Continuing)—may properly, and the emphasis on "properly," be allocated according to customer classes, [fol. 49] chain stores and others, and if one class required a disproportionate amount of such services, then, of course, the costs allocated to that class of customer would reflect that fact.

Q. But you are stating this only as a hypothetical situation?

A. If that is so.

Q. Yes, so that if the facts are——

A. As far as that last sentence is concerned, that last sentence is purely hypothetical.

Q. But that qualifies the first sentence?

A. The first sentence: (Reading)

> "The calculation of cost differences between competing retail stores should include the cost of executive time and expense attributable to securing and maintaining customers' accounts and the salaries and expenses of billing, accounting, credit and other office operations."

Now, if there were any of those costs that have not been reflected in the unit costs to be compared, why then, if that were so, and I understand it is so in the Borden case, then this is a statement of variation of good principle.

[fol. 50] Q. Now, were you aware of the fact that the Borden study did take care of the salaries and expenses of billing, accounting, credits, statistical and other office operations?

A. But not what is called executive time.

Q. But you do not know whether the order itself set forth facts that suggest they were appropriate for study or not, do you?

A. I do not think I saw a final order.

Q. And what you are saying here is if the facts shown suggested that there was a disproportionate time, then the study should be made?

A. No, no; as far as the first sentence is concerned, one of the things to be taken into account is the time of anybody that is selling, and if the executive does the selling you have to take that into account.

Q. Yes.

A. And also the clerks.

Q. But you do not know, as a matter of fact, any executive did any selling to chain store accounts at Borden?

A. No, I don't know. That was given to me.

Q. That was given to you by Mr. Woolley?

[fol. 51] A. That is right.

Q. Do you remember whether it was given to you orally or in writing?

A. I think that was given to me in writing. I think that was part of his review of the case that he gave me, and I think it showed his disagreement with that, and I thought he was sound in that.

Q. Now, if it appears from the facts that more time was actually devoted proportionately to the selling of independent stores by executives than it was to chain store accounts, then this would not be a pertinent criticism?

A. Assuming that that was a proper classification, which I thought from what I was told was basic to the whole study. I thought everybody was as cock-eyed as they could be classifying all chains together and all independents together.

It seemed to me that was no way to classify customers. But if that is the way you are going to classify, if you agree to classify them that way, then—that is why I emphasize "if." I say that is no way to classify customers.

Q. Again you do not dogmatize?

A. No, but to me it seems that way.

[fol. 52] Q. But that is said by you as a general reaction based upon the particular facts of this particular case?

A. I do not know much about it.

Q. Yes.

A. From what little I do know about it, that is the way it seems to me.

Q. Well, putting it this way, everything in C then is an opinion contingent upon the actual facts as they may be developed in this case, isn't that correct?

A. That is right.

Q. And there are no absolutes expressed in C any more than anywhere else in your comments?

A. Anything I have said today contains no absolutes.

Q. And each——

A. There are none.

Q. Yes, there are none, and what determines are the facts of the individual case?

A. That is right.

Q. Now, turning——

A. Let's see. Where are we going to continue? With D?

Q. Yes.

(Witness examining document.)

By the Witness:

[fol. 53] A. There I think that the Borden case as the case was explained to me does not reflect what I would consider the best practice.

By Mr. Ball:

Q. Well now, were you familiar with the fact that the driver's time was analyzed on time study and each element, including the service functions and the transportation functions were separately analyzed?

A. Yes, I understood that.

Q. Well, wouldn't that be all that you are asking for in D, is the separation of the costs of the two functions?

A. Yes, I think that is correct. They should be separated.

Q. Yes.

A. And if they were separated, that would cover D.

Q. Then D would not include——

A. That is correct; as far as D is concerned, I think you are right. Now, coming to E, the service functions.

Q. If I read D, all it says——

A. Oh, you did not go beyond Page 29, did you, in your question?

Q. No, my original question was on D. D involves no [fol. 54] criticism of what was done?

A. Yes.

Q. Now, looking at just E, did you understand that in the Borden case the driver's salary and wages, including his benefits and vacation costs, were in effect prorated to the service functions and the transportation functions on the basis of time and of studies? You understand that was done in the Borden study?

A. I understood that in the Borden study they were not separately allocated by customers, the cost of the transportation separately from the cost of service. I understood that they were not separately assigned.

Q. Well, putting it this way, Mr. Taylor, if the time and motion studies took account of all of the time of the drivers, if the studies separately timed the time spent in the stores and the time getting to the route and the time between stores and the time in preparing the truck, and if the total cost of wages and salaries were present, then in effect everything that you suggest in E was performed, wasn't it?

A. I did not understand the question. Could you repeat it?

[fol. 55] Mr. Ball: Read him the question, please.

(Question read by the reporter.)

By the Witness:

A. It isn't a question of time here but salaries and wages. You say the time is divided and the salaries and wages are divided?

By Mr. Ball:

Q. Mr. Taylor, the division, if you have the total costs of the drivers, salaries and wages and vacations, and you have the time spent by those drivers on each one of those functions, the matter of allocating costs becomes a mere matter of mathematics, does it not, to find out the costs?

A. You mean if you have the information you can make the calculation?

Q. Yes, yes.

A. As I understand, it was not done. I was told it was not done.

Q. What was not done?

A. The salaries and wages were not allocated between the two.

Q. Well, didn't you understand that there were no final tabulations or allocations in the Borden study?

[fol. 56] A. Well,——

Q. That the Borden study consisted of setting forth the data, summarizing the data and making certain mathematical divisions on the basis of that data with no final conclusion as to what differences of costs were stated; did you understand that that was the form of the Borden study?

A. No. As I say, I do not know the final costs, but I was given to understand, Mr. Ball, that although they had time studies of the total time spent by men, that this was not reduced to the money costs of getting the goods to the customer and the money cost of serving the customer after he got there, and I think that is what E says.

Q. Now, Mr. Taylor, what I want to ask you is this: If the order itself, the study itself showed the salaries of the drivers, salaries, wages, other costs of the drivers, if it showed the time spent in each one of the types of activities performed by the drivers, then the allocation becomes merely a matter of mathematical computation, does it not?

A. Yes; if you have all that information you could make the calculation, yes.

Q. Yes.

[fol. 57] A. I suppose you have the accounts of the company and all the informaton is there from which you could make costs.

Q. Well, did you understand that those costs were set forth, the total costs were set forth and the time allocations were set forth in the order?

A. I do not know whether they were or not.

Q. In other words, in expressing this—in drafting Paragraph E, you do not know whether or not that does apply to the Borden order, or not, do you?

A. No, I am merely expressing an opinion. My opinion

is that the money costs of the drivers' compensation should be divided between the transportation costs and the service costs, and that is all it says. Just an opinion.

Q. And you have no knowledge as to whether or not that was or was not done with the Borden study, other than something Mr. Woolley may have told you?

A. No. That is right.

Q. Now, turn to Paragraph F. Did you know that what you described there was or was not done in the Borden study?

A. I was under the impression it was not.

Q. You were informed by Mr. Woolley that Borden did [fol. 58] not allocate drivers' service costs among stores on the basis of time study?

A. No, that portion was not allocated and separately assigned as such.

Q. On any basis?

A. On any basis.

Q. Now, turn to G. Again, the logical allocation of any item of cost will depend upon the facts of the particular case, isn't that right?

A. Yes.

Q. There are no absolutes in this as in anything else?

A. No.

Q. And when we are dealing with transportation costs, there are no absolutes, are there?

A. No.

Q. And when you say the total transportation costs will most logically be allocated, you recognize that that may not be true if the facts suggest some other allocation.

A. This is a matter of opinion only, a matter of judgment.

Q. But it is a little more than that, isn't it? It is a matter of what the facts show with respect to the logical connection?

A. Yes, the facts as I understand them in this case. [fol. 59] My opinion.

Q. Yes; and the facts that you have are essentially those that Mr. Woolley told you were the facts?

A. That is right.

Q. Now, over on Page 31 you make a statement here:

"Such aggregated transportation costs may therefore be divided into parts——"

A. Now, let's see where we are.

Q. Right here (indicating).

(Continuing)—"only on a volume basis." Well, again, that is a statement that you have to qualify is it not? You cannot say it can only be done one way? In other words, what you really meant to say is, "Such aggregated transportation costs may therefore be divided into parts on a volume basis if that is the most logical basis, on the basis of the facts of the particular case."?

A. Well, I would substitute the word "preferably" for the word "only," I think would be more nearly exact.

Q. Well, it would not be preferably if the facts suggested it wasn't the most logical way?

A. No; I am stating my opinion.

Q. Well, opinion on a particular set of facts or generally? [fol. 60] A. On the facts as I understand them.

Q. Again, what are the facts you understand about transportation costs?

A. I understand that the driver loads up the truck at the platform with the amount of milk which he thinks that the customers on his route are likely to demand on that particular day.

Q. Was it your understanding that he loads the truck to capacity?

A. I have no knowledge of that at all.

Q. All right, go ahead.

A. I understand that he loads the truck with the amount of milk which in the aggregate will satisfy customers on that particular day, and that he drives that truck to the location where his customers have their stores and that the total amount of his wages in doing that, and of the other vehicle costs, constitute transportation costs.

Now, moving that amount from here over to here——

Q. Yes, now——

A. ——in that you have all of these cups, you see? (indicating) Now, one customer takes one cup, another customer takes all seven cups.

[fol. 61] Now, the only question is, how much of that cost goes against these seven cups and how much to the

one, and I say it is on the basis of some of this measured volume. I cannot see any better way to do it.

Q. Well, are you familiar with the way the facts as to how a route is originally designed?

A. I don't know.

Q. Did you see the union contract with respect to it?

A. Yes.

Q. Do you know, for example, that routes will depend upon the number of customers by the total amount of time taken to serve a group of customers within an eight-hour period?

A. Yes. I am told that. I know I read in this case that it depends largely upon the density of the population.

Q. Well, you understand, do you not, that it also takes the total amount of time to serve the individual customers once they get to the store that tends to determine or helps to determine the number of customers that are served?

A. That seems reasonable.

Q. Well, did you know that and did you take that fact into account?

[fol. 62] A. No.

Q. Did you know, for example, that it takes sometimes longer to serve a small independent store than it does a chain store, owing to the different methods in which the goods are delivered to the two types of stores?

A. Did I know that?

Q. Yes.

A. That it does take longer?

Q. Yes.

A. No, I did not know that.

Q. You did not take that into account, either?

A. I did not know anything about it.

Mr. Long: Well, I am going to enter an objection to all these questions on the basis of the fact Mr. Ball is raising matters that do not appear anywhere on this record, assuming facts that do not appear on this record here, and in respect to matters not a part of this record here.

I move the answers of the witness be striken.

Mr. Ball: Well, we will submit that to the Court.

By Mr. Ball:

[fol. 63] Q. Now, looking at Paragraph H, I want to read to you the first two sentences, or the first three sentences, I should say, down to the bottom of the page, and I ask you again if those aren't mere statements of general principles.

A. Are you going to read them?

Q. No, read them to yourself. I think that will be sufficient.

(Witness examining document.)

By Mr. Ball:

Q. That we have already covered and that is just a matter of general principle?

A. Yes.

Q. And as far as you knew, the Borden study did that?

A. The Borden study included the selection of yardsticks?

Q. Of units, yes.

A. Yes.

Q. (Reading): "Frequently the problem resolves itself into a choice of available units, none of which is perfect"; isn't that true?

A. Yes, that is generally true.

Q. Very often there are three or four or five?

[fol. 64] A. Yes. I had to pick one.

Q. (Continuing) "Good accounting practice dictates the selection of that basis which is most closely related to the activity or function the cost of which is being allocated."

That depends, does it not, Mr. Taylor, on the facts of the particular case?

A. Yes.

Q. And there might be more than one which are equally close?

A. That is possible.

Q. Now, turning to the next subject you say, "Obviously." You would have to qualify, wouldn't you, and say that that would depend upon, "in the absence of any special facts"?

A. I do not understand the question.

Q. You say, "The correct basis of the apportioning of the costs among customers——"

A. Where are we?

Q. Starting, "In the case of commissions paid——"

A. Oh, yes.

Q. (Continuing) "The correct basis of apportioning the costs among customers is obviously——"

A. See, it is obvious to me.

[fol. 65] Q. But you would always have to qualify that, "In the absence of special facts" or if the special case suggested a different measure, isn't that correct?

A. I may be wrong, but it seems obvious to me, it is how I feel. But it may be that I am quite wrong about that, but it seems to me it is obvious to me.

Q. But, as far as you know, there might be special facts that would make some other method more applicable?

A. Oh, I would have to concede that, yes.

Q. And you know about this only that—Well, did you know, for example, that the route drivers were not permitted or did not in fact solicit customers and that that function was performed by another type of employee known as solicitors?

A. I understood there were solicitors, but I didn't understand that there was any prohibition against the drivers soliciting.

Q. Well, do you know whether in fact the drivers do have any ability to increase or decrease the amount of milk which they deliver?

A. No, I do not know anything about that.

Q. And that would be one of those types of special facts that would have some relevance upon the yardstick to be used, isn't it?

[fol. 66] A. No, I do not think that would have anything to do with it.

Q. Now, will you explain that, the reason?

A. Why, yes. As you were saying, it depends upon circumstances of the case. Here is a case where you pay a man partly on time and you pay partly upon the volume, and you divide his work on the time basis for that part of his compensation which is paid on time.

So I say, since you calculate part of his compensation on volume, it is fairly obvious that the way that would be easy and direct and obvious is to divide that part of his pay

which is computed on volume, to divide it up on a volume basis.

Q. Assuming the facts that you have stated in your answer and assuming the absence of other special facts?

A. Assuming absence of other special facts which would make what I have said inapplicable, yes, if they would make them inapplicable, then, of course, the conclusion might be different.

Mr. Ball: I would like to ask the Government now on the basis of the witness' answers to produce the document prepared by Mr. Woolley, together with any other memoranda [fol. 67] that Mr. Woolley prepared that was handed to Mr. Taylor in order to meet the cross examination of Mr. Taylor.

Mr. Long: Well, we are going to respectfully decline to produce any memoranda Mr. Woolley prepared or prepared by anyone else on the Government's staff on the basis of the fact that these are work papers and that they are privileged.

Mr. Ball: I next want to request the Government to produce the correspondence that they have had with Mr. Taylor concerning the wording of the testimony which was submitted as part of the draft of the pretrial order.

Mr. Long: Well, we are going to refuse to produce those on the basis of the fact those involve correspondence files of the Department of Justice and they cannot be turned over to counsel without approval of the Attorney General.

I think that what counsel is after they can adequately [fol. 68] discover through depositions they are going to take of Mr. Woolley, which, I understand, they anticipate taking.

Mr. Ball: Well, we understand then until we have a ruling of Court on these demands, that we cannot close the deposition of Mr. Taylor.

Mr. Long: Yes.

Mr. Ball: On that basis I am through with my direct for the moment.

Mr. Stevens: I assume you would also refuse to produce that material on behalf of the Bowman Dairy Company?

Mr. Long: Yes.

Cross-examination

By Mr. Stevens:

Q. Mr. Taylor, would you produce your copies of your correspondence with the Government?

Mr. Ball: May the record show that I join in this particular request.

Mr. Long: The Government feels like Mr. Taylor should adhere to the wishes of the Government in that respect, but I will let you answer the question, at least until the [fol. 69] Court passes on this, that they not be produced.

By the Witness:

A. Did you ask me could I, or would I?

By Mr. Stevens:

Q. Would you?
A. You asked me to?

Mr. Ball: The question was framed "Would you."

By the Witness:

A. I have no attorney. I do not know how to answer it.

Mr. Ball: John, do you want to put it in the form of a question? I now request, Mr. Taylor, that you do produce the material that was furnished you by the Government and your copies of correspondence to the extent that it is in your possession.

Mr. Long: We would direct you to decline to furnish them that, Mr. Taylor. Now, you understand that this is directed at the correspondence between Mr. Taylor and the Government.

Mr. Hart: And the Woolley report.

Mr. Long: I think the Woolley report could be answered [fol. 70] by saying you do not have them, do you?

The Witness: Oh, I have nothing except correspondence. I say, my office has correspondence, correspondence files running back for a year. Do you want copies of that or do you want our original files?

Mr. Stevens: We would like to look at it and have the right to make copies.

Mr. Long: We do not think they ought to have that right, Mr. Taylor.

By the Witness:

A. I refuse.

By Mr. Stevens:

Q. Mr. Taylor, you indicated that you had spent up to a hundred hours on this matter?

A. Yes.

Q. Does that include the time that you spent in the last—well, today and any time you may have spent in the last few days getting ready for today?

A. Yes.

Q. Did you read the depositions of Mr. Taggart and Mr. Sawyer?

[fol. 71] A. Yes.

Q. Did you spend some time conferring with the representatives of the Government in preparation for this afternoon's session.

A. Yes.

Q. And that hundred hours also includes this other reading that you described, the legislative history of the statute, and various texts?

A. You have referred to a number, one hundred, which I said was just—it might have been three hundred; it might have been fifty. I do not know what it is, but whatever hours it is, I have no idea how many hours.

I have records of it which I can give you because we have time records, but at this particular moment I do not know whether it was a hundred hours or not. It probably was more than a hundred hours.

Q. But whatever it was, it included this other work also?

A. Well, I did do other work, and whatever hours they are will be billed to the Government at a per diem rate.

Q. You have not yet rendered a statement to the Government at all, have you?

A. Yes, we have rendered them up to some point or other.

[fol. 72] Q. Can you tell me whether the point at which

you rendered the statement was after the proposed testimony had been drafted?

A. I do not know really. I would have to check that. I do not know when our last statement was rendered. I do not know that. I will have to check that.

Q. Has there been more than one statement rendered?

A. Yes, yes; there have been two.

Q. Well, we would like to request those statements also, thinking they may indicate the number of hours that you spent.

A. Oh, yes, that is very easily secured.

Mr. Stevens: I do not know if the Government has the same objection to that, or not.

Mr. Long: I think we would make that part of the same objection.

By the Witness:

A. (Continuing) Well, I will refuse again. I am advised by counsel.

Mr. Ball: Let the record show Borden joins in that same request.

By Mr. Stevens:

Q. Such time as was spent on this matter by your office, [fol. 73] was it all spent by you personally?

A. Yes.

Q. You did not have any help from any employees?

A. No.

Q. Does the form of statement which you submitted to the Government indicate how you spent the various hours, or is it just a general description of the entire project?

A. It has some detail. For instance, the time sheet would show, "Conference with Mr. Woolley"; it will show, "Attendance at a hearing with Mr. Ball, Mr. Hart," like that. Or, "In search of records and studies of cost accounting texts." About that sort of detail.

Q. Can you tell me the amount of either or both of the statements which you have already submitted?

A. I do nof recall the second one. The first one was for

all of our services up to June 30, 1957 and was for $75. The second one was at some later date for a larger amount, and I do not recall that.

Q. Was the basis $25 an hour?

A. Yes.

Q. Now, isn't it correct, Mr. Taylor, that there were two memoranda prepared by Mr. Woolley, one pertaining to Borden and one pertaining to Bowman?

A. Yes, I think that is right.

[fol. 74] Q. And did I correctly understand that you have already testified that either in his written report or else in his oral statement Mr. Woolley made a criticism of the Bowman cost study insofar as the subject of transportation costs was involved?

A. Yes.

Q. And did Mr. Woolley also criticize the Bowman cost study with respect to the subject of commissions?

A. Yes.

Q. And did he also criticize the Bowman cost study on the subject of Central Office Overhead?

A. Yes.

Q. And all three of those criticisms are now reflected in your proposed direct testimony?

A. Yes.

Q. Whatever the number of hours is that you spent on this matter, of course, includes the time for both the Borden study and the Bowman check?

A. Yes.

Q. Did you review a study submitted by the defendant Bowman of the cost of serving various restaurants, hotels, and eating places?

A. Yes, I did.

[fol. 75] Q. Either in connection with this matter or at any other time, have you ever reviewed any professional literature on the subject of dairy distribution costs?

A. No.

Q. Do you consider yourself an expert in dairy distribution costs?

A. No.

Q. You reviewed the deposition of Mr. Bergfeld, I believe?

A. Yes.

Q. What was your understanding of the purpose for which that deposition was taken?

A. I knew no more about it than it had some connection with this question of the alleged discrimination in price.

Q. Well, did you understand that that was testimony which the defendant Bowman had offered in order to more fully explain written material which had been submitted?

A. I do not know more than what I have said. The purpose was not explained to me beyond the fact that this was a matter that might enlighten me about something about the problem, and I know no more than that.

Q. Well, let me ask you if you have ever read the portion of the final pre-trial order submitted on behalf of the defendant Bowman, which begins with Paragraph 28 on [fol. 76] the bottom of Page 19 and carries over to and including Paragraph 35, which ends at the bottom of Page 30; my question is whether you have ever read that material.

A. May I see what this is?

Q. Yes. Here, beginning from here on (indicating).

A. I do not recall ever having seen this. Like the man says, "It does not ring a bell with me." I may have seen it, but I don't recall it.

Q. Well, if that document is not listed on this list of material, which I believe is the material which was given to you, and I am referring to Taggart Exhibit 2——

A. This is something on a pre-trial order. I have seen things like that, that look like this, but I do not remember seeing this.

Mr. Hart: I think we have not determined yet that Mr. Taylor saw the same material.

By Mr. Stevens:

Q. Let me approach it this way, Mr. Taylor. I show you a document which has been marked -this is a photostat of a document marked Taggart Exhibit 2, being a list of documents for review by expert witnesses, and I will ask you if that is a list of the documents which were submitted to you?

A. I have no idea what that means, "Transcript Volume [fol. 77] VIII." It does not register anything with me.

Q. Did you read some of the testimony by a man named Eggleston?

A. Oh, yes, I read that. Yes, that is what that is?

Q. Yes.

A. Well, you see, I would not know from this. It does not mean anything to me.

Q. I wonder if they gave you a copy of this particular list (indicating).

A. Beg pardon?

Q. Did the Government give you a copy of this?

A. No, I never saw anything like that that I remember.

Q. Just turning to the Eggleston testimony for a moment, did that seem to you to have any relevance to the problem?

A. Oh, I thought that was very relevant to me, sure. After it was given to me for education, I got a lot of education out of it.

I remember this manual, "Government Costs Analysis Memos." I saw that.

(Witness examining document.)

Q. I suppose this is all we know.

A. The deposition, Volumes I and II, yes, I saw those. [fol. 78] "Bulk Wholesale Account: Restaurant." Yes, I saw something like that. It is hard for me to say just what I saw eight or nine months ago by titles.

Q. Is it correct, though, to the best of your recollection, the material which I indicated on these pages from Paragraph 28 at the bottom of Page 19 to and including Page 30 of the Supplemental Pre-Trial Orser entered with respect to Bowman—as far as you can recall now, that is new material to you?

A. It looks new to me.

Q. Would you be able at this time, Mr. Taylor, to tell us how much of the opinions which are expressed in your proposed testimony are predicated on material which you received from Mr. Woolley and how much is predicated on these various other items listed on this Taggart Exhibit 2?

A. No.

Q. The whole matter is all mixed together in your opinion and your opinions would be predicated in part on Mr. Woolley's material and in part on other material?

A. Yes, that is right. It was after I read all the material and then—this was just more or less a distillation of everything I got from reading and talking.

[fol. 79] Q. And would that also include your oral discussions and conversations with Mr. Woolley?

A. Yes; oh, yes.

Q. Those supplemented and helped to explain the various written documents?

A. The various what?

Q. Written documents?

A. Yes.

Q. I may have misunderstood your answers to Mr. Ball, but there was some discussion of the appendix to the Taggart report?

A. Yes.

Q. And did I correctly understand you to indicate that that had nothing to do with the Robinson-Patman Act?

A. Well, it was not part of the signed report which we all agreed to and discussed thoroughly, you know, where we had no dissenting opinions.

Now then, during the course of it, Ed Kelly said, "I have something here that explains a lot of this stuff that might be useful."

Taggart said, "Any objection to it?"

"No, no objection."

"Why don't we put it in as a supplement?"

[fol. 80] "Sure, all right."

So that is the way it was done. I mean, we did not discuss it paragraph by paragraph and sentence by sentence as we did with the other; I mean, it isn't of the same character.

Q. Well, isn't it correct——

A. (Continuing) It is like extended remarks in the Congressional Record. It is just about like that.

Q. Well, I take it the Committee did feel it was relevant?

A. Oh, yes, it is useful. As I say, as I told Mr. Ball, I think it is good stuff.

Q. Isn't it correct that the entire scope of the Taggart Committee Report dealt with the Robinson-Patman Act?

A. That is right.

Q. And this appendix was relevant to that purpose?

A. Yes.

Q. Well then——

A. All I am saying is it is a little different from the body of the report we signed. It has a little different status. It is like any appendix, you attach something on.

Q. Now, do you have the proposed testimony of Bowman? [fol. 81] The pages are a little different, so I want to be sure you take that one rather than the Borden one.

A. Yes.

Q. Calling your attention to Paragraph C on Page 23 which deals with executive time, if executives do devote a portion of their time to securing and maintaining various customer accounts, what method of allocating that time, as between different customer groups, would be appropriate?

A. Well, my own experience has been that you usually have to rely upon estimates of time devoted to the work in these cases, because the work of these people is likely to be intermittent.

You cannot take a test period of a short run, like a month. It has to be at least a year and you have to rely to a large extent upon the estimate of the person involved.

You get people that are earning anywhere from fifty to a hundred fifty thousand dollars a year as these men do, they are likely to be engaged in more than one kind of work.

For instance, a man in that category is likely to hold his job because he is on close terms with the purchasing [fol. 82] agent of a customer that buys five or ten per cent of a concern's output, and if he does not keep up that contact he loses his job.

In addition to that work, he has to supervise a whole crew of men. Now, it may be that the one or two big jobs that make him a hundred thousand dollar executive do not take up more than a quarter of his time and the rest of his time is all administrative.

So, for a quarter or a third of his time he is a direct salesman just like any peddler, but the rest of his time, two-thirds or three-quarters of his time, he is an executive and has to be prorated like anyone else, overhead.

That is ordinarily the way you have to go about it. You sit down at his desk with him and say to him, "Sam, how often do you go up to Graybar? How long do you stay? How often do you negotiate an A&P contract? Are these five year contracts?"

"Well, five year contracts."

"But do you have to go up and see them every week?"

"Well, not every week, but every once in a while you [fol. 83] have to be around there."

You get the feel of it, and then you are able to say whether it is a third or a quarter of this guy's time. His secretary goes along with it, and there you are. That is about all you can do with it.

Q. Well, first of all, the divisor you use, the service unit you use is time?

A. It is time in that case.

Q. And because of the fluctuations in his duties, you have to rely in part on his estimates and judgments?

A. And you have to take a long period.

Q. And the portion of his time in the dairy industry that, say, might be spent in procuring milk and dealing with the sale to retail customers and activities that had nothing to do with store sales, I take it that all of that could be excluded from any apportionment as between different classes of store customers?

A. And the particular problem we are dealing with here?

Q. Yes.

A. Just the store customers?

[fol. 84] Q. That is correct.

A. You have got to say, "This is the store customers. So much of this is store customers," and of that so much is direct and so much is indirect.

You have to boil it down, yes, that is what you have to do.

Q. So your first job is to exclude that portion of his time which is not devoted to maintaining and securing store business?

A. Yes.

Q. So you would exclude——

A. Exclude everything that does not have anything—say, if you are dealing only with the distribution function and if he has something to do with some other function besides distribution, you would exclude that also.

Q. Well, just as an example, I suppose you would exclude maintenance of the head office, procurement, research, motor transportation in so far as it pertains to bringing milk to the dairy from the country?

A. I would think so.

Q. Production, sales of by-products, sales of dry milk, sales of ice cream, and things of that character, which do [fol. 85] not deal with the sales of dairy products to stores?

A. To stores, yes. You are now speaking now about an executive's time, you are thinking about all the costs involved in those particular functions you named?

Q. Well, I would think the same reasoning applied to both.

A. I don't think so. I would think the whole works.

Q. And insofar as you isolate a portion of an executive's time as being devoted to store sales, you would apply the same percentage to the cost of maintaining his office and his secretarial staff and the equipment that was necessary to enable him to perform his job?

A. Well, yes, I think you might; yes.

Now, you are getting into details. I think you ought to leave a lot of that open to mechanics of your job. But I think that is one way.

You can have a rent charge and a lot of things, his pension, and so on, can go in there. His vacation. The mechanics of it I think we might just as well leave out.

Q. But if you selected time as a method of apportioning his own salary, that would also be a permissible way for [fol. 86] apportioning the supporting expenses to enable him to perform his job?

A. Yes.

Q. Because he has to have an environment in order to work?

A. Yes. In other words, if you are going to take that as a unit, you get into everything, the light, the heat, everything that goes in there, then divide it by time after you get into it. Mechanically, that is the way to do it.

Mr. Ball: Including the blond secretary.

By Mr. Stevens:

Q. Even if a time study of an executive's activities is performed, and you do have these conferences in which you estimate the portion of his time devoted to various functions, isn't it correct that there is a certain element of arbitrariness that may creep into this particular allocation in view of the fluctuation in his duties in his job?

A. Yes, that is right — well, not arbitrary. I do not think that is quite the right word, but you might say judgment. In any estimate there is an element of judgment involved there. It is not exact.

[fol. 87] Q. Is it perhaps less exact than some other areas of cost accounting?

A. Oh, yes, it is.

Q. In view of the fluctuation in the activities of top executives, is this type of breakdown of the executive costs as reliable for predicting future costs as are the more ministerial duties performed in different types of organizations?

A. I do not know anything about predicting. I cannot even find that the Weather Bureau can predict the weather. I do not think predicting has anything to do with Robinson-Patman.

It is hard enough to find what was done, let alone what is going to be done.

Q. Well now, in Paragraph F of your proposed testimony, at the bottom of Page 23 and the top of Page 24, where you refer to drivers' service costs being allocated among store customers on the basis of the time study of his activities, do you have before you what I am referring to?

A. Yes.

Q. Now, do you mean that the cost of the service function should be apportioned among customers on a time [fol. 88] basis?

A. Yes, I would think so.

Q. Why do you select time as a proper basis of allocating these service costs?

A. Well, I would not know any other way. This is time spent by men that are paid by the week, isn't it, mostly, and that time is practically paid by the hour and by the minute. It would seem to me to be the natural way to divide up the costs.

I mean, I cannot think of any more readily available unit than minutes.

Q. Now, if you select time as the basis for apportioning this item of cost, would you also use time to apportion costs of supporting the driver insofar as he is performing this service function, such as providing him with a clean uniform, and things of that nature?

A. You mean the cost of his uniform on a time basis? If you could not find anything else, you might have to. There does not seem to be too much relationship. Well, I suppose you might, yes.

Certainly his vacation and all of the fringe benefits, I think that can go on time. As far as his uniform is concerned, if you have not got anything else, I suppose that [fol. 89] is what you would do.

Q. How about the costs of providing him with tools, such as a dolly to perform the services in the store; could that also be apportioned on the time basis on the theory that it is part of the supporting facilities that enable him also to perform this service function which itself is apportioned on the time basis?

A. Well, lacking anything else, if you want to apportion it and you have nothing else to go on, and you cannot think up any other way to do it, you might.

You might think of some other way. You might use other factors. You would have to study that to see if you can think of some of these others we have talked about, all the different bases.

You have so much per customer, so much per hundred points. All these thing you would have to think about. I would if I were on the job, I would have to think about that before I would take time, because time seems a little remote to me.

Q. Well now, in your proposed testimony, you have divided the transportation expense, that is, strike that.

In your proposed testimony you have divided one area of cost into a transportation function and a service func- [fol. 90] tion. Now, would it be fair to say that for purpose of analysis to think the problem through we might assume that the transportation function was performed by one driver, that is, a portion of an individual who drives the truck, who drives the truck up, dumps the merchandise off without expending any time, and then drives on to the next stop, and the remaining portion is performed by the second hypothetical person who does the service, so that for purposes of analysis let's assume you have two men doing what is really one man's job.

Now, if you had a second man performing the service

function it would be necessary to get him to the store in a vehicle, would it not?

A. I would not know about that.

Q. Well, he certainly could not perform the in-store services without——

A. I mean, you are asking me about things about the dairy business I do not know anything about at all. That is an assumption. I would not make an assumption because I know nothing about it.

Q. Isn't that an easy assumption to make, that a man cannot do any work in a store without getting to the store?

[fol. 91] A. Well, if it is so. Your question is if you had to provide the things then it would be a cost. If you provided it, it would be a cost. The answer is yes, it would be, if you did.

Q. In one of the elements of cost of performing this service would be the cost of transporting a man to the store, would it not?

A. Yes, in that case it would on your assumption.

Q. And on that assumption you would also have to provide him with a uniform and tools and pay him a salary, and so forth?

A. Yes.

Q. Now, wouldn't it be permissible to allocate all of those costs among customers insofar as the service function is performed on the basis of time that that man spends in the various stores which he serves?

A. Oh, I don't know about that. He might be so much per store. No, no, not at all, not time, no.

You have got to transport him to each store in that case, so much for each store. I do not see how time has anything to do with it in that case. You have just got to get him to the store.

Q. So you would do it on a per store basis?

[fol. 92] A. Well, I mean, that is one thing you think of. I would not know. This is all new to me. That is the way it strikes me.

You have a contract with this man to land him at the work place. Now, you are assuming that. You have a contract and you are going to do that and it costs you

money to get him to a work place and to each work place, I suppose.

Or he walks from the first one; you transport him to the first place and he walks to the next place.

Q. Let us assume there is enough distance involved that it would be uneconomic to ask him to walk.

A. You mean then he had to be transported to each work place?

Q. Yes.

A. So you have a chauffeur for taking your men around to all the work places where they are going to pick these things up at the curb and take them in? I think we are getting into an area that is pretty fanciful.

Mr. Long: I object unless this is going to get a little nearer to the issues here of what the Bowman cost defense is.

By Mr. Stevens:

Q. Well, let me ask you this, Mr. Taylor. Wouldn't you [fol. 93] follow some method of apportioning the costs of enabling this man to perform the service function?

A. I do not know how you can identify that as a proportion of the costs because he rides on the truck, he drives the truck, and you are talking about dividing the cost of a truck between passenger transportation and freight transportation.

You have got two things there and you want to say how much of it was passenger transportation and how much was freight transportation.

Q. No, that isn't quite right.

A. We are not concerned with what might be, we are concerned with what is.

Q. That is right.

A. And it is hard enough, as I said before, to get actual costs without attempting to get theoretical costs. Now, the actual cost is that we have a passenger who is also a driver, and we have passenger transportation and we have freight transportation and, as I understand it, you are talking about dividing the two, so much for the passenger and so much for the freight.

Q. No. I have not made myself clear. The example is that the truck is free to dump the merchandise and proceed

[fol. 94] on its way without any delay at the store, and that the man who performs the service functions goes in a different automobile, a different vehicle, and the vehicle must stay at that store long enough——

A. But it does not do that. You are talking about something you do not do at all. Let's talk about what we are doing. I cannot answer questions about what some other method of doing it is.

I am only concerned with what you do, not with what you might have done. Now, what you do do is have a man at the platform, as I understand it, who loads up a truck with milk and brings it to the store. Now, we are talking about that cost. We are not talking about a man that is taken by a chauffeur to a store, because you do not do it. So let us not talk about that.

Q. Well, let me ask you, Mr. Taylor, and maybe we will come back to the other— How do you select the proper method of allocating the cost of, say, gasoline for running this truck?

A. Whatever you pay per gallon is the cost.

Q. And how do you determine how to apportion that cost? among different customers?

A. You don't.

[fol. 95] Q. You don't do it at all?

A. No. I never heard of such a thing.

Q. Well, are there any items of transportation cost that you do apportion among different customers?

A. Individually? No. I never heard of it. It is beyond my experience.

Q. Well, what about the costs of maintaining garage facilities, same answer?

Mr. Long: Now I think I object to that on the basis that that is outside any facts or figures or any kind of study in connection with the Borden case.

Mr. Hart: You mean we do not have garage expense? We do not buy gasoline? I wish you were right.

Mr. Long: Maybe the question can be made a little more meaningful with respect to this lawsuit.

By the Witness:

A. I think I know what you mean: How do you handle truck expense? It is bundle of expenses which includes

repair, garage and oil and gasoline. You deal with a bundle. You do not treat each one separately.

By Mr. Stevens:

[fol. 96] Q. You do not make any effort to analyze each one separately and proportion each one among customers on a different charge with a different yardstick?

A. No, I do not think anybody would think of it. You have got them all bundled. Then you want to know how to handle the bundle. Take the wages of the driver and your garage. You have got a bundle either for each truck or for the whole fleet, whatever your system is.

Now, I am not putting in a system here, but you get a bundle of costs, then you find a factor to divide that bundle up.

Q. What is it that led you to separate the time of the driver performing the service function from the time he is driving the truck and put those in two separate bundles?

A. Because I think you pointed out yourself he is two different people. He is a chauffeur in one case and he is the salesman in another case. He is two different people doing two different functions. Ordinarily a man in an organization of size performs one function, one function of one individual, and you always try to get that when you classify your costs. It makes it better.

[fol. 97] You draw your organization chart that way. But here is an exception. You have one man where you have to divide him down the middle and say for a certain length of time and a certain part of his wages you pay him as a chauffeur, and part of his wages then you are paying him as a delivery man.

Q. Now, then——

A. (Continuing) So it goes into this transportation bundle that I am speaking about.

Q. Now, in actual fact you have supporting expenses such as the truck and the garage, and so forth, which are necessary to get the man to the store to enable him to perform both functions.

A. Sure, you have got to get the milk to the store.

Q. And the man to the store.

A. The man and the load of milk.

Q. Now, how do you determine which bundle to put

these supporting expenses in, in the transportation bundle or the service bundle?

A. Well, I think you would need time for that. I think you need time studies for that to find out. You have to discover that.

Q. And would it be true that if he spent seventy-five or [fol. 98] eighty per cent of his time in one of the functions rather than the other, you tend to put everything in that bundle?

A. Yes. I think your time study would teach you how to divide it.

Q. I take it that in your review of this material with Mr. Woolley or by yourself you made no effort to analyze the portion of the driver's time which is spent in service function and the portion that is spent in the transportation function?

A. No, I made no analysis of any kind.

Q. Now, when one is considering—let's just assume we are dealing with the transportation function now, and one is just trying to decide how to apportion transportation expense, cost of vehicle, and so forth, how do you go about determining what yardstick to use?

A. Well, of course, you consider the various ones that you know about. You can name them off yourself from different ones that are available.

Q. Well, now, wouldn't it be correct, Mr. Taylor, that an important consideration would be whatever the limiting factor is, that when you reach, say, a certain capacity of a truck, that you then have to go out to buy another truck [fol. 99] to serve another route; that if the capacity is reached in terms of weight, well, then, weight might be a factor. Would that be found?

A. I think you would have to take that into account.

Q. Or if volume were the limiting factor?

A. Yes, I think so.

Q. Or if there were union agreements which specified the number of points which a man could deliver, that might be the factor?

A. I think that might have something to do with it. You would have to take into account everything about it that you could find out.

Q. Well, now, what if the facts showed that the trucks

were not loaded to their physical capacity but that the available time of the driver was the limiting factor of the size of the route because he was required to spend so much time at different stores, and, of course, the truck had to stand parked there while he was there; might not time then be a proper factor to consider in apportioning these transportation expenses?

Mr. Long: Now, I object to these portions of the factor, all this matter about the capacity of trucks, and how much they could load. There is nothing here that I know of in [fol. 100] the Bowman pre-trial order about it. Can you point it out to the witness?

Mr. Stevens: I do not have to point it out. That is a proper hypothetical question to be asked of a witness tendered by the Government.

Mr. Long: It is not proper in respect to the Bowman cost defense.

Mr. Stevens: My question is a hypothetical question. I am asking for Mr. Taylor's opinion on a hypothetical set of facts. We can argue its relevancy in the case later.

Mr. Hart: Well, you have got the objection.

Mr. Long: He can go ahead and answer and to the extent it is not consistent with what our record is, well, we will raise that later.

Mr. Stevens: Would the reporter read the question, please?

(Question read by the reporter, as follows:

[fol. 101] "Q. Well, now, what if the facts showed that the trucks were not loaded to their physical capacity but that the available time of the driver was the limiting factor of the size of the route because he was required to spend so much time at different stores, and, of course, the truck had to stand parked there while he was there: might not time then be a proper factor to consider in apportioning these transportation expenses?")

By the Witness:

A. No.

By Mr. Stevens:

Q. Why not?

A. The man, as I understand it, loads up his truck at the platform with the amount and items of dairy products which he thinks the customers on this route are going to require in that day's delivery. He does not know, however, how much of each item any customer is going to demand until he reaches that customer.

[fol. 102] So the transportation and the milk as costs all become merged in that truck and they do not separate by customer until he reaches the premises of the customer, at which time the proportion of the load allocable to a particular customer becomes known for the first time. So it does not matter, any of these things that you have enumerated, what the capacity of the truck is and what the agreement is.

All you have done is merely changed the location of some dairy products from the Central Warehouse to a truck warehouse ready to deliver to the customer, so that you see you do not have any way until that point of saying whose milk is whose.

See, that is the first point where you can just say it all comes up to here, when you reach location, and it is only at that point, which includes the milk and the pasteurizing of it, and everything else, it is in transportation, everything is all up to here, then it becomes this store and that store and that store.

That is the only place where there is any difference in costs from this point out. (Demonstrating).

[fol. 103] Q. Well, is your opinion based upon an assumption the truck is nothing more than a moving warehouse?

A. That is right, it should be treated as such, I think. That is your best analogy.

Q. What purpose does a warehouse perform generally?

A. As a place for the storage of goods.

Q. Does a truck perform that function?

A. Yes.

Q. The principal purpose of the truck is to store the merchandise?

A. Store the goods and have them available at the place where they are needed, yes, just as a branch warehouse, as distinguished from a central warehouse. This becomes a branch warehouse, analogues to a branch warehouse as distinguished from a central warehouse.

Q. What is the limiting factor on the use of a warehouse among different customers?

A. You are limiting this in what respect?

Q. Well, is there any limit on how much merchandise can be put in a warehouse?

A. Weight, space.

Q. That in your assumption is not necessarily the limiting factor in the use of the truck which you are using as the [fol. 104] analogy?

A. Well, as I understand, the trucks are limited in space and weight, yes, I think they are.

Q. But, I believe you indicated your opinion would be the same even if the truck were not loaded to capacity?

A. That is right.

Q. So that the capacity of the truck is irrelevant for the basis of your opinion, as far as the basis of your opinion is concerned.

A. Oh, not all warehouses are used to capacity.

Q. Can a warehouse serve more than one customer at a time?

A. Certainly. That is what branch warehouses are for. That is why you have the branch warehouses.

Q. Is there any time when a warehouse is being used solely for just one customer?

A. Yes.

Q. Well, in considering a warehouse, you do not have the problem of the warehouse taking time during the day moving from one spot to another, during which time it is not available to——

A. No, what I said was just an analogy. I do not say it [fol. 105] is a warehouse, I say it is a useful way of viewing this thing for the purpose of explaining the costs.

Q. But isn't it true, Mr. Taylor, that insofar as the analogy fails time is significant in connection with the truck

and it is not significant at all in connection with the warehouse?

For example, you need time to move the truck from the dairy to the customer's place of business, and during that time the truck cannot be used for any purpose except getting the merchandise there; isn't that correct?

A. Yes.

Q. And time is expended during the day while the truck must be parked in front of a particular customer and cannot be used to serve anybody else during the time it is parked at one location?

A. I do not know that that is so. I do not know why that should be so.

Q. Well, if——

A. I cannot see why you cannot have more than one customer served from a truck while standing in one place, if they happen to be right near the truck and across the [fol. 106] street.

Q. Well——

A. I know my own street they serve more than one customer from one spot.

Q. You are talking about a retail route.

A. I know, but why should that be? You proved already I do not know the dairy business, but I do not know why it should be so.

Q. Well, if, in fact, the stores are located two or three blocks apart, then the truck can only be used to serve one store at a time?

A. Yes. They would have to move.

Q. And while it is parked in front of one store then it could only serve that store?

A. Yes.

Q. Unlike a warehouse which can service many accounts all at once?

A. Yes, that is right.

Q. And if——

A. In other words, you can always carry an analogy too far. It is purely for the purpose of illustration and clarification. That is the only reason the warehouse was brought in.

[fol. 107] Q. But if the truck must stand, say, three-quarters of its time parked in front of these stores to

enable the merchandise to be taken off the truck and put into the store, then time has a significance in connection with the truck that it does not have in connection with the stationary warehouse?

A. Yes.

Q. Of course, the same is true with the time spent getting the truck to the place of business and back to the dairy at the end of the day?

A. Yes, but not necessarily any difference between one customer and another customer, one store and another store. Time might not necessarily have any difference there.

As I understood it, the point of the computation is the computation in the difference of the cost between one store and another that competes with it with respect to the cost of getting it to the location from the platform, and that that is the only thing I thought we were talking about, and time has no relationship to that because it becomes part of the cost of that place utility of getting it from one place to another.

That place utility is not a matter of time.

[fol. 108] Q. Well, let me give you an example that I gave to Mr. Sawyer. I will just read you the same question I asked him:

(Reading)

"Q. If, for example, it could be shown that a dairy had a half a dozen routes with a chain store on each route and by reason of a contract with a chain or any other provision that perhaps required delivery during a rush hour or some particularly difficult time to make delivery that the dairy was compelled to keep its trucks parked in front of the chain store on each route for half of a working day, and it was a condition that pertained to every day for every chain store, would it not then be reasonable to say that half the item of depreciation for those trucks should be charged against the chain, since half the truck time was spent at the premises of the chain?"

A. Do you want me to answer the question?

Q. Yes.

[fol. 109] A. No.

Q. Even if the truck—if it could be shown that half of the time of the truck was used to serve a particular customer, you would still say that it would not——

A. You are talking about depreciation?

Q. Right. Well, just as an example,—all right, let's just leave it on depreciation.

A. They do not handle depreciation that way.

Q. How do you handle it?

A. It is part of the bundle, it is only one element.

Q. Well, how do you charge the bundle if the chain required 50 per cent of the dairy's trucks to use to serve the chain?

A. You take that factor into consideration with everything else under all the circumstances of which that is one factor, but I certainly would not consider that an element to be considered isolated all by itself to give an answer. No, I could not answer that at all.

Q. But you would——

A. You cannot do accounting that way. I can't. I have only been in the accounting business forty-seven years, and I cannot answer that kind of a metaphysical question.

[fol. 110] Mr. Long: Well, I think we should give the witness a short recess here.

Mr. Stevens: Yes. All right.

(A short recess taken.)

Mr. Stevens: Are we ready to go ahead?

Mr. Long: Yes, all set.

By Mr. Stevens:

Q. Mr. Taylor, where truck transportation costs vary by distance, is mileage a proper divisor for that cost category?

A. Where applicable it is.

Q. How do you determine where it is applicable?

A. Where the circumstances would indicate that the distance is the factor of difference between customers. You are talking always, of course, between customers, aren't you?

Q. Yes.

A. Because that is what we are talking about here.

Freight rates, for example, are distance, and rate, and weight and distance make a freight charge. That is standard.

Q. Well, if we are talking about truck transportation costs——

[fol. 111] A. Truck transportation rates are distance and weight, too, I presume.

Q. I assume your proposed direct testimony was intended to relate to problems in distributing dairy products by trucks owned by the dairy?

A. Yes. There the case is different.

Q. In other words, this sentence in your proposed testimony on Page 23:

> "If truck transportation costs vary by distance, then mileage is a proper divisor for that cost category."

You were not talking about dairy truck transportation costs?

A. No, no. Where is that on Page 23?

Q. The top of Page 23 (indicating).

A. Oh, yes. Well, if it were, but it is not in this case.

Q. Well, do you suppose the truck transportation costs might be higher on a longer route than an a shorter route?

A. Yes.

Q. Well, then, wouldn't it be true——

A. If you were comparing routes, yes.

Q. (Continuing)—that in the dairy business, truck [fol. 112] transportation costs will vary by distance?

A. Yes, in some cases. Say in the instance you gave between two routes, it would.

Q. Say you added a new customer to a route that requires the driver to take a long detour and therefore burn more gas, hasn't his transportation costs been changed?

A. Not between one customer and another customer, no, not transportation costs between the platform and the route, not that transportation cost, because that has not changed any. It is only internally you are talking about now?

Q. That is right.

A. If you want to do that, of course, you will have to go into all the ramifications of this internal transportation,

which would vary all the time. You would have no standard to go by.

Q. So what you really have to do is find a factor which focuses on differences between the different groups of customers?

A. The different individual stores.

Q. All right. Now, in terms of transportation costs, assume you had a route where customers took varying amounts of merchandise but the truck was able, either [fol. 113] instantaneously or at uniform time intervals to unload the merchandise at each store in the same amount of time, and say there is no differentiation among the customers in terms of distance, so you would have to just stop, unload the merchandise, go to the next stop, unload more merchandise; would it be permissible to apportion transportation costs on that hypothesis among customers on a stop basis?

A. Oh, yes, sure. In other words, by your own definition, they are all alike. If they are all alike you treat them all alike.

Q. They are all alike in terms of the time it takes to serve and the distances, but not in terms of the quantities delivered to each customer?

A. It would not make any difference because you have already said they are all alike.

Q. So even though differing amounts are served to each store, you could still apportion the transportation costs on a stop basis on that hypothesis?

A. In the same circumstances.

Q. Yes.

A. Not the transportation to the route.

Q. Well, whatever——

[fol. 114] A. You could not do that very well.

Q. Whatever you put in the bundle, put it that way.

A. Oh, no. As we were just saying, this movement from the platform onto the route is part of the cost of the milk. You could not charge them the same amount per quart for the milk no matter how many quarts they took.

Q. I am only directing myself to the problem of apportioning transportation costs among different customers and with respect to that problem on the hypothesis that there is no difference among customers in terms of the time it

takes to get to them, the amount of gas that is burned, or the work in getting the merchandise off the truck. Wouldn't it then be proper to apportion the transportation costs among customers on a stop basis?

A. Certainly not, no. That would be foolish.

Q. Why not?

A. As I say, it would be just the same as charging a man the same for a gallon of milk as a quart. They are different things.

Q. How would you apportion it?

A. Here you have four quarts of milk and you brought that from the platform up to the route, four quarts, and [fol. 115] here is a man you only brought one quart up and you say you are going to charge the same for each?

Mr. Hart: He did not say anything of the sort.

By the Witness:

A. (Continuing) You cannot do that. That transportation is part of the milk just as much as the cream is part of the milk. That transportation in getting it to the spot, that place utility is just as much a part of the milk as the water or cream in the milk in there.

By Mr. Stevens:

Q. Mr. Taylor, I have only been directing myself to the transportation costs, you understand?

A. Yes.

Q. And you are saying that the transportation costs should be apportioned on a volume basis?

A. Certainly. I cannot think of any better way.

Q. Are there any circumstances at all that you can envision or you can remember from your history of this field of accounting where you would not recommend apportioning transportation costs on a volume basis?

[fol. 116] A. I cannot think of any. You mean time to this with the facts like this particular dairy situation, you mean?

Q. Any facts.

A. Oh, well, I cannot go that far. I have difficulty with one set of facts, to say nothing of bringing out everything I have ever seen.

Q. I am just trying to find out if this is a universal principle as far as your own practice is concerned?

A. Any place where the facts are like this or analogous to this I would say the preferable way is to treat it this way. I say the transportation up to the route is all just as much a part of the milk as any other part.

Q. What leads you to the opinion such costs should be apportioned on a volume basis?

A. Because that is part of the cost. I cannot think of any other way in which you can reflect the relative costs, the relative volume.

Q. Well, now, supposing you had a route which had thirty stops on it, various sized customers, you say you apportion the costs among them on the basis of volume delivery; suppose you have another route you have to run a hundred miles and you have one customer on it and ten [fol. 117] points of milk delivered to that customer, would you charge the cost of delivering to that customer just the same as the cost of delivering ten points as to a customer with a route with thirty points, because they both get the same merchandise?

Mr. Long: I am going to object to that question on the basis I think you have gone miles outside the record. You have gone a hundred miles outside of the record along with this hundred miles between customers. Unless you can come down to this particular case here I am going to advise the witness not to answer.

Mr. Hart: Well, if you are going to persist in advising him not to answer this question, Mr. Long, we want to go before the Court. If that is not a proper question, why, I want his determination of it, not yours.

Mr. Long: I do not see how talking about customers on a milk route a hundred miles apart has anything to do with this alleged cost justification of Bowman.

Mr. Ball: Let the record show this is an examination of [fol. 118] a witness tendered as an expert witness, and the witness is subject to a question on a hypothetical question in order to get to the basis of his reasoning. The question is advanced for that purpose.

Mr. Long: The hypothetical facts must have some relationship, some closeness to the facts on hand. He is not

here to answer every conundrum that counsel can talk about.

Mr. Ball: This becomes a proper means of questioning this witness because the witness has explained that he does not know the facts of this particular case.

Mr. Hart: If your objection is to the hundred miles we can make it ten. If you say there isn't such a fact in the milk sheds of the Chicago area, why, I will take it upon myself to prove that there is.

Mr. Long: Will you bring it down to five miles?

Mr. Hart: No. As a matter of fact, he may go up to thirty or fifty if you keep on pressing on it. I can take it upon myself to show that.

[fol. 119] Mr. Long: The Government further objects on the ground there is nothing in the record that shows the composition of these routes, the organization of them, and the distance between customers. Until this part of the record is clear, I don't think the witness needs to answer.

Mr. Stevens: Well, I would like to state for the record you have asked this witness to express opinions on the basis of an incomplete presentation of records that had been made and it is necessary for us to examine him on a hypothetical basis in order to get his opinion.

He does not know the facts. He did not review any of the large, large volume of underlying material which would have enabled him to be examined on a factual instead of a hypothetical basis. That is why I must proceed this way.

Mr. Long: I answered that by saying I think he is.

[fol. 120] Mr. Ball: Are you now instructing him not to answer?

Mr. Hart: If you are we want to suspend right here and go before the Judge.

Mr. Long: Well, I am going to persist in my instruction to the witness on the basis of a hundred miles apart not to answer the question.

Mr. Ball: I would like to have the question read back as originally stated.

(Question read by the reporter as follows:

"Q. Well, now, supposing you had thirty stops on it, various sized customers, you say you apportion the costs among them on the basis of volume delivery;

suppose you have another route you have to run a hundred miles and you have one customer on it and ten points of milk delivered to that customer, would you charge the cost of delivering to that customer just the same as the cost of delivering ten points as to a customer with a route with thirty points because they [fol. 121] both get the same merchandise?")

Mr. Stevens: Let me rephrase it.

By Mr. Stevens:

Q. Let's assume you have one route located close to the dairy with thirty customers on it, one of which takes ten points a day. I take it you are saying you would apportion the costs, the transportation costs among customers on that route on the basis of points and, therefore, charge ten out of the total number of points against this one hypothetical person, if you want to call him A.

A. All right.

Q. Let's assume you have another route which is much farther from the dairy. The truck is not able to serve as many people on the route. It drives much farther and has much greater costs of getting to the route and of making service on the route.

One of the customers on this second route also takes ten points, Customer B. Would you say the cost of serving Customer B is the same as the cost of serving Customer A, insofar as we are talking about transportation costs?

A. You say it is the same?

[fol. 122] Q. Yes.

A. How could it be the same when it is a hundred miles away? It is more. It is a different route. You have got different customers. Everything is different about the different routes. Everything is different about it. You have got to take all the facts into consideration in the different routes. Everything is different. All your results will be different on the different routes. Of course it would.

Q. So you would not apportion the costs among different routes on the basis of volume?

A. I should think—now, here, as I say, I am not a dairy accountant, but I think you would take it route by route and find out what were the facts in one route and what

were the facts in the other route and study them all, study as many routes as you need to get a knowledge of the situation.

Q. Then if we say it is much more costly to serve the people on the second route for the reasons you indicated, and you transferred a customer from the first route to the second route, you continued to buy the same amount of merchandise, would you say that the cost of serving them has changed?

A. Certainly the costs would change if you mean your [fol. 123] customers changed you have one less customer on Route A and one more on another.

Q. Well, what it comes down to, I think, Mr. Taylor, is that the cost of serving a given customer depends in large part on the route he happens to be on; is that not correct?

A. I should think it would be different on different routes, naturally, yes. I would think so.

Q. But then for a given route you would always apportion costs among customers on a volume basis?

A. The transportation costs, I would think so.

Q. So if you took a customer off of one route and put him on another route, that would reduce the total volume of the first route, is that correct?

A. Yes.

Q. And that would thereby increase the cost of serving the remaining customers, according to your reasoning?

A. Yes.

Q. So that a man—well, let me ask you this——

A. If the costs remain the same. If the costs remain the same.

Q. Assuming, at least insofar as you have the same truck and you have the same driver, same maintenance, same [fols. 124-125] depreciation, same license, same insurance, same garage.

A. If the volume increased and the costs remained the same, then the unit cost would drop.

Q. Would you think for Robinson-Patman Act purposes a dairy could justify increasing the price to a customer on such a route by taking another customer off that route and putting him on a different route, then would that be a satisfactory cost justification or, rather, cost differentiation for Robinson-Patman Act purposes?

A. If the costs differed by an amount equal to or greater than the price differences, it would be cost justified.

Q. Even though the sole cause of the cost differentiation resulted from the transferring of some customers from that route to another route?

A. Well, yes.

Mr. Stevens: Off the record, please.

(Discussion had off the record.)

Mr. Stevens: All right, we will recess then tonight until tomorrow morning at 9:30.

(Whereupon a recess was taken in the above-entitled matter, to 9:30 o'clock, a.m., Tuesday, April 29, 1958.)

[fol. 126] April 29, 1958

Otto F. Taylor, a witness having been heretofore duly sworn, further deposeth and saith as follows:

Cross-examination (continued)

By Mr. Stevens:

Q. Mr. Taylor, do you have any recollection today of the approximate amount of the second bill that you rendered to the Government for your services in this matter?

A. No more than I gave you yesterday, just a guess. You see, my firm sent the bill out. I do not keep the books.

Mr. Long: I would be willing to get the time that he billed the Government for and have it inserted here in the record, but not right now.

Mr. Ball: We would appreciate it.

Mr. Stevens: That is fine, and the date of the statement.

Mr. Long: Or statements. They can appear here.

By Mr. Stevens:

Q. Now, Mr. Taylor, let's turn to Page 22 of the material with respect to Bowman. That is your proposed [fol. 127] testimony, Paragraphs A and B. Now, at the

end of Paragraph A you refer to the Robinson-Patman study, that it must "also be in terms of cost per unit or equivalent."

Would you explain that a little more fully, what you mean by the equivalent?

A. It could be a percentage. It could be five cents or five per cent or something like that.

Q. Applying across several different products sold to a customer with a uniform percentage applied?

A. Sometimes you need to express it in a percentage, sometimes it is possible to reduce it to a unit.

Q. So that it would be possible to compare transactions with different customers which involved more than one product by comparing, say, five per cent, or something like that?

A. Ordinarily you want to do that, you see, because a price has to do with a product.

Q. Well, supposing you had a situation in which a company sold to two different customers or two different groups of customers, and several products were involved with respect to both.

A. Oh, yes.

[fol. 128] Q. And there might be certain kinds of selling expense attached to sales to one customer but did not attach to one particular product. Could you then treat one expense as a charge against a whole group of transactions with that one customer as distinguished from the other customer?

A. You could do anything with figures that you wish to do, depending upon your purpose. Certainly you can do anything with figures, that is what they are for. It is like the English language. You can say anything you wish.

I do not believe I understand that, sir, because mathematics is just a language like the English language.

Q. Well, I just want to find out what you meant by equivalent in that kind of a situation where you might have a group of expenses.

A. Oh, I mean, I think I can clear that easily enough. If you are going to compare the price of a thing with a cost of a thing, you have to have the price and the cost corresponding with each other so they would not be like this but they will be like that (indicating).

So if you have it so much per pound as the price and so [fol. 129] much per pound as the cost, all right, so you might have a percentage discount and a per cent cost difference, as long as they are comparable. That is what I mean.

Q. Then to relate it to the example I am suggesting where you have either two customers or two groups of customers and there is an item of expense which is chargeable against one but not the other, but that it is not divisible by particular product; in other words, say you have salesmen just call on that particular group of customers to maintain their good will generally, and you find that that item of expense represents roughly five per cent of your costs, or something like that——

A. Yes.

Q. (Continuing)—could you then charge that customer five per cent more than the other customer on all the products, without trying to break it down by each group?

A. Well, you might first have to do that before you broke it down because, you see, you must get it down to products or you would not have any problem. It has to get to products.

In this particular case—that is why Robinson-Patman [fol. 130] accounting is so different from cost accounting generally. Cost accounting generally you might want to know how much money you made on one customer and how much you made on another. That is another problem that we are not dealing with here.

Here we are dealing with a price of articles. It has to be an article sold to two different customers. We want to know the price of that article, we want to know the cost differences of that article. So they all have to do with the article.

Q. Well, supposing in this example this cost which is chargeable against one customer and not the other represents, we will say, five per cent of the total cost, how do you apply that to particular products if it is something maintained for the general good will of that customer?

A. May I rephrase it? If we have a case of sales to two different customers——

Q. Right.

A. (Continuing)—of mixed aggregate of articles in each

case, there are some of the articles that are not common to the two customers.

Q. No. Assume they are all common to the two customers, but in varying amounts.

[fol. 131] A. Oh. We are dealing with only one commodity sold to two different customers?

Q. No, several commodities but in varying amounts.

A. They are all the same articles then, they are like articles? They are all articles of like grade and quality, is that right?

Q. Well, just to put it in the dairy industry, suppose there is cottage cheese and quarts of milk?

A. Well, those are different articles then.

Q. All right, different articles; and each of the customers buys the same group of articles but there might be a different mix?

A. Oh, the mixes are different?

Q. Yes.

A. Now then, we are studying one of the articles in the mix, or each of them?

Q. Well, take it both ways.

Mr. Ball: The aggregate.

The Witness: You cannot get the aggregate, Mr. Ball, because we are talking about an article and that is all we are talking about, is an article. Say cream cheese or milk or whatever the article is, that is all we are talking about, [fol. 132] that one thing, and all we do is to bring it down to that one point.

By Mr. Stevens:

Q. Now, let's assume there are no cost differences at all in terms of platform costs or any difference in the articles or the method of delivery except this one item there is an overall expense of X-thousand dollars a year in maintaining the good will of the two groups of customers.

A. Say you might advertise one and not advertise the other.

Q. Something like that, or you might have salesmen call on one and not on another.

A. Yes.

Q. Or you might entertain him regularly and not the other.

A. Now then, we have divided all of our costs on these two customers. We have only two customers?

Q. That is right.

A. And each one of them has a mixed aggregate of like items but in different proportions?

Q. Yes.

A. So now we have divided our costs up in these two parts and each part has a mixed aggregate, and our prob-
[fol. 133] lem then is to separate out the particular article that we are dealing with as of this moment.

Q. Well, our problem is to give appropriate effect to this item of cost.

A. Yes.

Q. With respect to one and not with the other.

A. This would be a differential cost and not an overall cost, because we are talking about Robinson-Patman, where there is some differential cost.

Q. Yes.

A. Where there is a difference in the quantity sold or there happens to be a difference in the method of delivery.

Q. No, I am assuming no difference——

A. There is no difference in method but there is a difference in quantity?

Q. Well, no, none that gives rise to cost differences. There may be differences in quantity but they are not significant.

A. Then my definition is there are no cost differences.

Q. If there is, for example, overhead expense in terms of executive time maintaining the good will of one group of customers, you would not consider it appropriate to take that expense into consideration in your cost study?

A. You have to take into account any where there might
[fol. 134] be a difference in costs that results from difference in quantity.

Q. No, I am assuming, Mr. Taylor——

A. You are assuming there is no cost difference?

Q. No cost difference resulting from a difference in quantity.

A. Oh, yes.

Q. The only difference is the cost incurred by the dairy

by having some of its personnel devote time and money to maintain the general good will of one group of customers.

A. Well, then, you are contradicting yourself, I am afraid, sir, if you will pardon me. You say there is no cost difference, but at the same time you say there is.

Q. I say there is no cost differences created by reason of differences in quantity.

A. Well, then you have no problem. You say the methods are the same of sale, the methods of delivery are the same and the quantities are the same; then there is no problem.

Q. With this one exception, Mr. Taylor, that, let's say the sales manager of the dairy spends his full time and spends a lot of expense money maintaining the good will of one [fol. 135] of the customers. That is an expense involved in serving that customer and there is no comparable expense incurred in connection with the other customer, so that there is that cost difference.

A. Oh, yes.

Q. But there is no other cost difference.

A. This is a particular direct cost which is direct according to a certain customer or class of customers.

Q. All right, now, if on that assumption, how do you relate that cost to the products sold to that customer?

A. Well, if that were the only costs you have to deal with, the only cost difference, you just divide that by the volume and find out how much per unit that amounted to and that is the cost difference, because it is zero on one and it is the total quantity divided into the cost difference that you have in the other, and that is the difference.

Q. Would there be any purpose in bringing that back to products?

A. Well, I think you would have to bring it to products first because you are only dealing, as I said before, with an article. You have to bring it to products. It is after you have brought it to products that you calculate your unit [fol. 136] cost; and make this long division that I am speaking of, dividing the dividend.

Your dividend is the differential costs of that particular article, and the divisor is the quantity of other unit that you use as a proper means of measurement on the article.

The differential costs of that article—that part of your Robinson-Patman problem is the very thing you are speak-

ing about. You have product costs, and you have customer costs.

Q. So that you are saying that you would think that it would be important even if it was just a simple one-item cost involved to reduce that to each of the forty or fifty products that might be sold and then in turn break that down——

A. I do not know what you mean "you must." It depends on what you are trying to get at because, as I have said so many times, everything depends on your purpose, what you are trying to get at.

Are you trying to get at cost differences between customer classes? If you are, you must recognize all costs to customers.

Q. Let's assume what you are doing is you are starting out trying to make up a discount schedule that would be [fol. 137] a lawful discount schedule.

A. Say a case where you are trying to establish a price list?

Q. Yes, and you sell a large number of products to this one customer and a large number to another customer?

A. Oh, yes.

Q. And you do not know in advance exactly how many of each type or product the customers will take, but you can predict in advance what this item of expense will be because you have been dealing with the customer for many years.

A. Oh, yes.

Q. Now, is it your suggestion that you must make an estimate of how many of each of the products will be purchased over the year and apply a portion of this to each of those products?

A. I don't see how you can avoid that.

Q. You would not think it would be permissible to make an overall comparison of the costs and reduce it to a percentage and then apply that percentage to the whole group of products which are sold?

A. Well, it is difficult for me to install a system of pricing without knowing all the facts. I do say you would have [fol. 138] to examine all the facts, consider all the alternatives and then all the things that are needed to invent to get a cost-justified price.

I cannot go beyond that because the circumstances of the individual case would govern. You would need to know all you could find out about it if you are going to construct a price list.

Q. Well, I just want to be sure—you did not mean to rule out the possibility of setting up a discount schedule in which a discount was granted based on an aggregate of purchases of various products?

A. No.

Q. You did not mean to say that each product must be priced and discounted individually for all customers?

A. No, no.

Q. I assume you would agree that would be most impractical in some situations?

A. You mean in constructing a price list?

Q. Yes.

A. Well, I do not see why. You can have a percentage price list once you come to cost justify that price list. Of course, you would have to reduce your overall applicable discount percentages to the individual products.

[fol. 139] You could not avoid that because you are comparing prices of articles. Now, if it was five per cent of everything then it is five per cent on each. So that is fairly simple.

Q. Well, if you found an overall justification of five per cent you could then just transfer that as five per cent of each of the articles?

Mr. Ball: In the aggregate?

Mr. Stevens: Yes, in the aggregate.

By the Witness:

A. Ordinarily you would not do that. I have never known of a case where you would do it. Well, I know of one case in the Commission where that was done, but that is very, very unusual.

Ordinarily, you would find an article, one article where you would reduce everything to that article.

By Mr. Stevens:

Q. Then use that article in effect as the standard?

A. The cost of that article, the price on that article, and then get a difference.

Q. Use that to sort of typify the whole group of articles?

A. No, no; that is the only thing you are talking about. [fol. 140] Ordinarily you are not talking about different articles; ordinarily you are talking about one article.

In your case you are talking about cream cheese or butter, or whatever it is you are talking about, you are not talking about all of them.

Q. Do you know what we are talking about in this litigation?

A. You are talking about fluid milk, as I understand it. That is what you are trying to get at, fluid milk being sold in a mixed aggregate with others. You would have to sort out the fluid milk.

Q. What is your understanding of what was being justified or attempted to be justified in the cost defenses submitted in this case?

A. I understand different customers would have different prices.

Q. For what products?

A. For milk.

Q. It is your understanding that the case relates only to the sale of milk?

A. That is what is my understanding.

Q. That is the milk you drink as distinguished from——

A. Yes.

[fol. 141] Q. And there is not involved in this case anything to with, say, chocolate milk or cottage cheese or buttermilk or pints of cream or extra special cream, or anything of that nature, is that your understanding of this case?

A. Well, no, but I understood that milk was the principal item involved and the attention of the cost attention was concentrated largely on that. But I do not know that I had an opinion that nothing else was considered. I was never told that.

Q. Well, did you think it was quarts of milk or gallons of milk?

A. I had no opinion about whether it was as to the capacity of the containers.

Q. Well, did you get a copy of the pre-trial order that

was entered at the close of the Government's case in this matter? I show you a copy of it. (indicating)

A. I never saw anything that looked like this. I do not know. I may have seen it in another form.

Q. Directing your attention to Paragraph 1 (indicating).

A. I remember seeing a list like that, yes. Yes, I remember seeing something like that.

Q. And you are referring to Paragraph 1 under the [fol. 142] agreements of fact between the plaintiff and the Bowman Dairy Company?

A. Yes.

Q. Did you feel that had any relevance to this matter?

A. Well, I did not give it any special consideration.

Q. But did you understand that the Bowman discount schedule granted a discount just on the fluid milk item of either quarts or gallons?

A. I did not really know what the prices were of anything. I did not deal with the prices at all.

Q. Didn't you know what the discount schedule was?

A. No. I saw something in the testimony that I read. I think it was Mr. Malone's testimony, I think that it was Borden's, in which he made remarks about price, but I never saw a price list of either of the defendants.

Q. Did you see a discount schedule of the Bowman Dairy Company?

A. No, I didn't.

Q. In other words, you were asked to give an opinion on whether a justification for a particular discount schedule was valid without even looking at the discount schedule?

A. No.

[fol. 143] Q. Well, did you look at the discount schedule?

A. No.

Q. Well, wouldn't that be something that would be of interest to you to determine whether a cost study to justify various discounts would be proper?

A. No.

Q. You do not know what products the discount applied to?

A. No.

Q. You do not know whether the Bowman Dairy Company used a blanket discount or sliding scale discount, or what kind of discount it was?

A. No.

Q. Do you know what customer groups were involved in the Bowman Dairy Company discount schedule?

A. I never saw a schedule.

Q. Yesterday you made a remark about the classification between independents and chains being cockeyed, as I remember.

A. Yes.

Q. Do you know whether the Bowman Dairy Company ever made any such classification?

A. I have no independent judgment about it, but I was under that impression.

[fol. 144] Q. But you do not know from the basis of the material which you examined in preparation for your testimony in this case whether the Bowman Dairy Company made any such classification for the purpose of granting either differences in price or differences in discounts to its various customers?

A. No.

Q. Now, Mr. Taylor, again going back to Page 22 of the proposed testimony and referring to Paragraphs A and B generally, were they inserted because you felt they had some relevance to this case, or were they just put in there because they would be interesting reading of the kind of the appendage to the Taggart report?

A. That is a sarcastic remark, I think, and I do not think I will answer it.

Q. Well, was it because you thought they had some relevance to this case?

A. I think that is obvious. I was doing a job.

Q. All right, Mr. Taylor, referring to the last part of Paragraph B, where you refer to the functional analysis of expenses, which means dividing expenses into separate parts, each part representing the cost of a certain homogeneous activity, with respect to drivers' compensation, [fol. 145] am I correct in inferring that the two types of activities that are involved are the service function and the transportation function?

A. Yes.

Q. And each of those was considered to be a homogeneous activity?

A. Yes.

Q. And that the entire compensation of the driver should be assigned to one of those two activities?

A. I did not say anything about the entire compensation. The compensation that was properly allocable to the activity ought to be treated as part of that function, whatever was proper.

Q. Well, Mr. Taylor, in Paragraph B, you do indicate, do you not, that the various categories of money spent by a seller during a period of time should be assigned to a particular category?

A. Yes.

Q. Now, taking the money spent in paying drivers their compensation, I take it the relevance of this paragraph to this case is that you are saying that that dividend, that expenditure of money should be assigned to certain categories, is that correct?

A. In making the assignments you have to take into [fol. 146] account also what you are going to do with it and you have to take into account the units into which it may be divided, as well as the amount of the assignment itself.

You have an assignment but you cannot ignore the fact that once you have divided a total that you are going to have to divide it up, you are going to have to divide each aggregate. You cannot ignore that, either.

Q. But it was the purpose of this paragraph to indicate that the money spent to pay the drivers should be assigned to specific categories, is that correct?

A. Yes.

Q. And the two categories that you referred to in your proposed testimony are the service function category and the transportation function category, is that correct?

A. Yes.

Q. All right, now——

A. But I did not say that you could not divide the driver's compensation, some of the commission on a volume basis and what they are paid on time on a time basis because we accountants have to do things the easy way. [fol. 147] If you have time you use time, if you have volume you use volume. It does not mean you cannot separate the drivers' compensation into parts.

Q. Well——

A. Certainly you can. If it is convenient to do it, you do it the convenient way.

Q. Well, which category does the portion of the driver's compensation which is paid in the form of commissions——

A. I would not know how to divide that commission between the transportation and the other because I think it is all taken together, so that after you divided it, you see, you would have the same problem. So you might as well take it altogether as to divide it.

I do not see how you could attach one part of his pay to one function and one to the other.

Q. Well, what you are saying then is you do not assign all of the driver's compensation to any category?

A. I do not think you would be required to. I think it might be useful and convenient to treat one part of his compensation one way and another part another way.

Q. So that this general statement in Paragraph B does [fol. 148] not apply to your treatment of commissions?

A. Well, it would be modified to the extent that I have just said.

Q. I take it the principle on which you modify it is that it is more convenient to do it another way?

A. That is right. The mechanics in this matter of Robinson-Patman is vital.

Q. So that this basic technique that you describe in Paragraph B is one to be followed unless there is a more convenient way to handle certain items of costs?

A. Yes. I think they are all subject to exceptions.

Q. And an exception based on convenience?

A. I think convenience is important, yes, sir.

Q. So that I am correct in saying that Paragraph B was not intended to have any relevance to the portion of this case which deals with commissions?

A. Now let me read it. (Witness examining document)

By the Witness:

A. No, this contemplates treating commissions separately. That seems to be called for. I think it applies. I think it applies because you have to divide out—this speaks of getting unit costs by dividing units into money to get money costs of the units. I think that applies.

[fol. 149] For instance, if you are paying for something for a volume or where the use of volume for a unit is convenient you would say there you would apply this technique.

Q. Well, if you are applying this technique, what is the functional analysis you make of the cost of the commissions?

A. It is still two functions. You still have two functions on this that we have been talking about, because it is a transportation and a service function, and he is being paid a commission which must be paid for both functions, so you would apply that to each of the two functions and treat each of them that way, I would think.

Q. Now, again, I really do not mean to be sarcastic, Mr. Taylor, but at the bottom of Page 22 again you intended the introduction to this paragraph, which runs over onto Page 23, to apply to the problem involved in this case?

A. Yes.

Q. When you say, "these divisors should be those units for each individual function—" I misread it.

"These divisors should be those units which for each individual function most nearly reflect or cause the [fol. 150] variations in the amount spent."

A. Yes.

Q. Now, I take it that should apply to the transportation function as well as to other functions?

A. Yes.

Q. And I just want to be sure I am clear on this. Yesterday I suggested an example to you where the amount of time and distance and other elements of work involved at each stop were the same.

A. Yes.

Q. And you indicated you still would not allocate transportation costs on a stop basis, as I remember your opinion yesterday.

A. I think other bases might be preferable, put it that way.

Q. Now, supposing we had a situation where experience over many years of study indicated that a certain number of stops could be made in a day and that was pretty much constant, say fifty stops could be made a day regardless of the amount delivered at any one stop, so that whenever the fifty-first stop was reached, it was necessary to add another

route, so that that number of stops could then be the factor which caused variations in the amounts spent for new [fol. 151] trucks and maintaining them and hiring new drivers;

If those were the facts, then wouldn't the stop basis be an appropriate basis for apportioning time?

A. I would not think so, no.

Q. Even if it was the number of stops which most nearly reflected or caused the variations in the amounts spent?

A. I will have to repeat what I said so many times. If I wanted to find out the cost of operating trucks and if I wanted to know what would be the effect of taking on new territory on my truck costs, I certainly would not ignore stop costs under those circumstances.

Here we are dealing with something entirely different. We are dealing here only with the difference in cost per unit between one customer and another customer, one store and the store across the street, and that is all we are dealing with, as I understand it.

Q. Yes, but this sentence in this proposed testimony was intended to deal with that problem, was it not?

A. Yes. In fact, I think that is all this problem is about, between one store and another store, that is, as I understand it, and all we are dealing with is the cost phases of it. [fol. 152] You spoke about price. I never thought about price. I only have been thinking about costs, and that is all I was consulted about, was costs.

As a cost method the transportation to the area of the route is a cost of the whole load and none of it is for a particular customer, as I understand it.

It does not become a particular customer's milk, or whatever the product is, until it reaches the zone, reaches the store. It isn't a matter of dividing between customers from the platform on. It is not identified with the customer until later, and it is only at the point where it becomes identified with one customer or another that you can possibly have differences in the cost to one store and the cost to another store.

That to me is so plain I do not see why we have to discuss it.

Q. Well, Mr. Taylor, if that is the basis for your assumption, would your opinion be different if the customers

phoned their orders in before the truck ever left the dairy so that before the truck left, the driver knew just how [fol. 153] much was to be delivered to each customer?

A. I certainly think that would have to be taken into account and I am not prepared to say just how you would handle it in a situation like that.

Q. Well——

A. That would be more like your conventional order selling and order taking and order handling proposition where each customer's order is separately handled and where transportation and selling are separate functions. That would be a situation, if I am informed correctly, which would be entirely different than what we are dealing with here.

Q. In other words, your opinion is predicated upon the assumption that until the truck arrives at the store and the driver contacts the owner of the store, he does not know how much milk is going to be delivered to that store?

A. That is right.

Q. And your opinion might well be different if, before the driver ever left the dairy, the driver knew, say within a degree of error of five or ten percent, how much milk was going to be delivered to each one of his customers? [fol. 154] A. I would not know if it would or would not.

Q. I appreciate that these are difficult problems that require familiarity with the industry, but that might be an entirely different situation?

A. Yes. The facts control. That is a different set of facts than I was dealing with.

Q. Mr. Taylor, we referred to an example of a moving warehouse yesterday, and I notice also in Paragraph G of your proposed testimony that reference is made. Is that an analogy that was suggested by Mr. Woolley?

A. No. It was suggested by me in the first instance.

Q. Now, even in the case of a stationary warehouse if you assume, for example, that one customer of the warehouse rents the entire warehouse for the month of January, say, to store oranges for a couple of weeks, something like that, would not it be proper to apportion the cost of maintaining the warehouse, taxes, depreciation, various other items to that customer on a time basis, namely, charge one-twelfth of this maintenance cost to him, if every year he rented the warehouse for a twelfth of a year?

A. I have never known of that being done, no, and it does not seem to me to be as good as you could do. I think you ought to be able to do better than that.

[fol. 155] Q. Well, how could you do better than that?

A. I would say that warehouse costs should take into account, when they come to divide them up, space and weight, volume of the various commodities that are stored, modified by time.

You have got space, weight, time and money. I think you have everything you need for warehouse costs.

Q. Well, in the example I suggest, Mr. Taylor, if this one customer rented the warehouse for the month of January and then put either nothing or just a negligible quantity of merchandise in the warehouse——

A. This is the seller, now? You are speaking of the seller's warehouse?

Q. No, no; I am assuming a warehouse which is rented out to the public for such uses they may choose to make of it.

A. Oh, a public warehouse?

Q. Yes; and that there is one customer who rents the entire warehouse for a specific percentage of each year. My example was the month of January.

A. Yes.

Q. And I am suggesting to you that it would be proper [fol. 156] to charge a twelfth of the cost of maintaining the warehouse to that customer irrespective of the volume he put in the warehouse, because the warehouse is tied up for a twelfth of the year.

A. Whose costs are we talking about, the seller?

Q. The seller is the owner of the warehouse.

Mr. Long: I am going to note an objection here. I think this has gone way outside of anything that could possibly be germane here. The witness can go ahead and answer, but the question has no relevancy to the cost study made in the milk business.

By Mr. Stevens:

Q. Go ahead and answer, Mr. Taylor?

A. I will have to ask for a clarification of the question.

Q. Fine. I will try to make it more clear, if I did not make is clear. Let us assume that someone is in the busi-

ness of selling or renting warehouse space to the public.

A. Yes. We are looking at things from his point of view, from the warehouse owner's?

Q. Yes. Let us assume you are the warehouse owner.

[fol. 157] A. Right.

Q. And I come to you and I rent the entire warehouse for one month each year.

A. Yes.

Q. And I pay you for it.

A. Oh, yes.

Q. And other people come to rent parts of it for different periods of time, and so forth.

Now, the question is whether or not it would be proper in making a cost study of your costs of operating the warehouse to charge one-twelfth of your costs of maintenance, taxes, and so forth and so on, to the cost of doing business with me because I use a twelfth of the warehouse.

Mr. Long: Same objection as heretofore made.

By Mr. Stevens:

Q. I use the warehouse a twelfth of the time.

A. It seems to me that would be proper because I understand your question to be not in computing the costs but in dividing the costs among the users of the warehouse after you have found the cost, not in finding them, but after you [fol. 158] have found them, that one customer uses one-twelfth of the facilities of the warehouse on an annual basis——

Q. Yes.

A. (Continuing)—and other customers use eleven-twelfths.

Q. Right.

A. And by dividing by customers, if that be your problem, one-twelfth of the aggregate annual cost would be a proper charge to the customer who used one-twelfth. I think that answers itself.

Q. All right, Mr. Taylor. Now, supposing we transfer the analogy to the dairy business, and if upon analysis we found that one-half of the time a truck was being used to provide service to a particular customer during the entire working day or working year, would it not then by analogy

be proper to charge one-half of the cost of maintaining that truck after you found the costs, as you indicated, to that particular customer?

A. No, not if I understand the facts correctly. It is not a matter of time at all. It is a matter of milk.

Q. But the basis for your not accepting this

A. Because no customer is using the whole truck, if I [fol. 159] am informed correctly. The different customers take different quantities, different proportions of the truck load. I start from there, that you have a truck load of dairy products to be delivered on the route to the different customers on the route.

So it is not a matter of time, it is a matter of milk.

Mr. Long: Is this a good time for the witness to stretch a moment?

Mr. Stevens: Yes.

(A short recess taken.)

By Mr. Stevens:

Q. Let us turn to the subject of commissions, Mr. Taylor. Are you aware of the fact that there is a different rate of commission paid on rates depending on the size of the route?

A. No, I did not know that.

Q. Well, subject to Mr. Long's objection, I would just like to indicate that there is a provision in the union contract that indicates that there are no commissions on a wholesale route under 2400 points.

A. I understand that.

Q. And from 2400 points for the first 4,000 commission points——

[fol. 160] A. Seventy-five cents.

Q. And at the still higher volume it is ninety cents?

A. I understand it is a matter of individual routes. You have separate agreements on different routes.

Q. The basic formula is the same for every route

A. That is what I mean.

Q. But if the route reaches one point in size it changes from a no commission route——

A. It is a graduated scale but not different by different

routes. You do not have different contracts for different routes.

Q. No, they are not different contracts for different routes, but on some routes it would be possible that no commissions would be paid and on other routes——

A. It might work out that way.

Q. Yes. The commissions might be paid at the rate of seventy-five——

A. I know it wasn't for a man who delivered only twenty-four hundred points, he would not get any commission.

Q. And on another route——

A. But if he delivered over 6,400 points he would get a larger commission than under 6,400 points.

Q. So there would be in effect three types of routes, [fol. 161] those where there is no commission, those where——

A. I do not know what you mean by no commission. I knew it went by size because I read the contract.

Q. So we have it clear, under 2,400 it would be——

A. No commission.

Q. From 2,400 to 6,000——

A. Sixty-four hundred.

Q. Sixty-four hundred, excuse me; it would be at a rate of 75 cents per hundred, and over——

A. On the excess over 2,400.

Q. That is right, on the excess over 6,400, it would be at the rate of 90 cents per hundred.

A. No, 75 cents on the 1,600 and 90 cents on the balance over 6,400.

Mr. Stevens: All right, let's go off the record.

(Discussion had off the record.)

By Mr. Stevens:

Q. So, in any event, there are in effect three brackets. All right, now, let's take an example where there is a route of 2,400 points on which no commissions are being paid. Mr. Mart has called my attention to Article 42(a) of the union contract. Well, withdraw that.

[fol. 162] Assume a new customer is added to that route taking, say, a hundred points on which a commission of

75 cents would be paid. Would you charge that commission costs against that customer?

A. No.

Q. How would you charge him?

A. Proportionate of all the customers on the route. Proportionate to the amount they took.

Q. Let us take it the other way around. Start with 2,500 points on the route and assume we can eliminate the cost of 75 cents by taking a hundred point customer off the route.

Now, on that assumption, would you charge that commission cost against that customer?

A. There would be no cost.

Q. I mean, prior to taking him off. It would be a cost which could be eliminated by removing a customer. I take it your answer would be the same, that you still would not charge it against just one customer?

A. No.

Q. That is, "No," you would not charge it against just one customer?

A. I would not charge it against just one customer.

[fol. 163] Q. Now, would you agree with this sentence from the proposed testimony of one of the other witnesses in this case:

> "If an expense is such that it would be eliminated if the customer were dropped, it is hard to say that it is not a specific cost to that customer."

Mr. Long: I would object to that unless he could see the rest of it so you do not just take it out of context there. Let him look at the sentence or two in front of it and after.

By the Witness:

A. I am not prepared to testify to a generalization of that character, no. I am not contradicting it or affirming it. I would have to think that one over quite a bit. It is rather a broad statement, I think.

By Mr. Stevens:

Q. Well, just so there is no question about my giving you a fair opportunity to make an answer, would you turn

to Page 8 of the proposed Bowman order, that is, proposed Government order against Bowman, and read Paragraph H, which appears at the top of that page?

A. H?

[fol. 164] Q. H, yes.

A. Let me see what leads up to that. What is this all about?

Q. This is part of Professor Taggart's proposed testimony.

A. Oh, Professor Taggart is testifying and says, "If drivers do exercise some influence on volume delivery——"

(Witness examining document.)

By Mr. Stevens:

Q. Now, the question which I asked and wonder if you are in a position to answer is whether you agree with the last sentence of that paragraph.

A. No, I do not. I do not agree with the paragraph as a whole or any part of it.

Q. Thank you, Mr. Taylor.

Now, as I understand your view, and I am through with Professor Taggart's testimony now, Mr. Taylor—as I understand your view, you would charge the commission costs on a route basis, you would divide up the total commissions charged against a particular route among the customers on that route?

A. Yes.

[fol. 165] Q. On a volume basis?

A. Yes, I would think so. I cannot think of anything better, let's say that.

Q. Now, assume that you have a route on which no commissions are being paid which contains——

(Co-counsel conferring.)

By Mr. Stevens:

Q. (Continuing)—because of the 2,400 points on each side?

A. Yes.

Q. And you have another route on which some commissions are being paid because it is larger, and I won't worry about how much——

A. Yes

Q. (Continuing)—and assume that you have a customer on one route who is exactly like a customer on the other route in all respects, quantity delivered, amount of time required to serve, and everything else, and say they purchase exactly the same products, and so forth, with the one exception, that one of them is on a commission route and the other is on a no commission route.

Would you think it proper to charge those customers different prices reflecting no more than the difference in the [fol. 166] commission costs on the one route as against the other route?

A. You would find that to be so, because that would be a fact.

Q. So your answer would be yes?

A. Yes, it would be a fact if that were your problem to compare these two customers on these two routes and you had no other problem than that. You had only two routes, two customers, and you had nothing to consider but the commissions which were none in one case and some on the other, that would be the result.

Q. Well, that, of course, would be true even if there were several customers on each route and the only cost difference between them was this commission charge?

A. That is right. That is the fact.

Q. Well, would the same be true if I said you paid the drivers different amounts apart from their commission, just that each one had a higher wage rate than the other?

A. Whatever the costs were, that is what they would turn out to be. They are what they are. We are dealing here only with actual costs, money spent.

A proper division of money spent among the categories [fol. 167] that are being considered, that is our whole problem.

Q. All right. Now, I want to give you something else that Professor Taggart has written, not in this case, but elsewhere, and see if you have a comment to make on it.

Mr. Taylor, there are some excerpts from an article and we could not get the whole article out of the library so we just typed them. It was previously marked Sawyer Exhibit No. 1 for identification. There are several excerpts. The one I want to direct your attention to is the excerpt which

appeared on Pages 314 and 315 of the article, and is a hypothetical example involving the hypothetical Universal Coffee Company. I will give you the whole exhibit and you look at as much of it as you want, but this is the part I want to ask you about, the part beginning, "Assuming the Universal Coffee Company—"

Mr. Hart: Tell him what article it is from.

By Mr. Stevens:

Q. It is called "Sacred Cows of Accounting," or something like that. It is by Professor Taggart, written within [fol. 168] the last few years.

(Witness examining document.)

By the Witness:

A. Yes, I have read this. Yes, this is a dissertation on the liability under certain sets of facts of allocating on a percentage basis, say such as commissions, solely on the basis of the way they are originally calculated and there are circumstances, as pointed out here, in the hypothetical example, where the facts of the case might indicate that that would not apply.

By Mr. Stevens:

Q. So that specifically with respect to the hypothetical example of the Universal Coffee Company and the question which Professor Taggart himself asked in that example, does it really cost one hundred times as much to obtain the business from Joe's Supermarket as that from Hayseed Corners?

He then answers in the negative. Would you also make a negative answer in this example?

A. Dr. Taggart was using the device of what you might call the "horrible example," so he constructs the horrible example and then he destroys it. I mean, that is a literary technique he follows. That is all he is doing.

[fol. 169] He says, "Let's construct this great big straw man," then he builds him up, then he tears him down, and that is what he did in that article.

Q. But I wanted to be sure that you also would make

the same answer that he made in his article to that kind of an example.

A. In the same circumstances.

Q. Yes, I appreciate that.

A. Yes, in the same circumstances.

Q. And the circumstances, I take it, are that the salesman here in fact spends a great deal more time and effort on the small customer in proportion to the volume of the order he receives than he does relatively for the larger customer.

A. You say he does?

Q. Well——

A. Are you saying that to be so?

Q. That is the significant point of this example.

A. Oh, you mean in his example?

Q. Yes.

A. Oh, he points out there where the time spent proportions are quite different from the percentage propor- [fol. 170] tions in that case; yes.

Q. And——

A. That is shown to be a fact.

Q. And, of course, it is also pointed out in the example that the management requires him to call on the small customers as well as the large profitable customers.

A. Yes.

Q. And those are the kind of facts which would be relevant in determining whether or not commissions should be charged on a straight volume basis or on some other basis.

A. Well, the straight volume basis would be the obvious basis, as Professor Taggart points out, but if it can be shown on the basis of fact that that is not the best basis, some other basis should be chosen.

But, I mean, the first choice is to take the obvious and easy method. Now, then, if you can show that that works out that way and that another basis would work out better, you should take the better method.

Q. And the kind of facts which were just identified, namely, the disproportionate amount of time and effort going into doing business with the small customer is the [fol. 171] kind of thing you would consider in determining whether or not the obvious method is more appropriate?

A. Yes, I think you ought to consider that. You ought to

consider all the facts which you can get, of which that would be one.

Q. And in your testimony, proposed testimony, in Paragraph H about commissions, you were merely identifying the obvious method without trying to indicate that you had studied all the facts and made a determination of whether the obvious method was really the appropriate method?

A. This is based upon what knowledge I had of the facts.

Q. Now, Mr. Taylor, in your professional experience, have you become acquainted with any other cost studies in any other industries in which a truck driver's compensation was broken into two or more parts, one of which was allocated on a time basis and another was allocated on some other basis?

A. No.

Q. So that the suggested procedure, insofar as it deals with the driver's compensation in this case, breaking it into service function and transportation function is unique [fol. 172] in your own experience?

A. Yes.

Q. And that is the procedure which was suggested in the memorandum which Mr. Woolley prepared for you?

A. Mr. Woolley indicated to me that that was his thought, yes, and I agreed with him.

Mr. Stevens: That is all I have.

Mr. Ball: Mr. Long, I have, in the light of what were to me surprising answers today, a few more questions.

Now, I can defer those as recross but I thought it might be helpful to you if I asked them first before you.

Mr. Long: That would be fine.

Cross-examination. (Resumed)

By Mr. Ball:

Q. Mr. Taylor, what is your understanding as to how Borden set about to make this cost study? What did they do?

A. I understand that they employed a firm of accountants —I think they are an auditing firm—to advise them on the distribution of costs and also their own employees organ [fol. 173] ized a study of time and took actual time studies under the observation of their professional advisers.

Q. Do you recall what activities the time studies covered?

A. Yes. I believe that the time studies covered the timing of the various activities of the drivers throughout their day.

Q. Were there any other time studies that you recall?

A. Yes, there were observations made of the clerical costs, of the order handling and billing at the Central Office.

Q. Now, what was done with this data so far as you recall?

A. I believe it was compiled to secure average units of billing and of performing functions by the routemen whose time was observed in the tests which, as I recall, was in December of 1955.

Q. Now, what classes of customers?

A. Store customers.

Q. Yes, but what classes of store customers were covered, do you know?

A. As I recall, it was an observation of the time of each [fol. 174] customer on the selected routes of each store on the routes.

Q. It was your understanding that the study was a study of the cost of individual customers, is that right?

A. Yes.

Q. And were you or were you not aware that on these routes were also some wholesale, so-called wholesale customers who were not store wholesale customers?

A. I believe there were some. As I recall it, that was brought out to be exceptional.

Q. Do you recall what the Borden discount schedule was?

A. No.

Q. Do you recall what products were studied?

A. No.

Q. Do you recall whether or not this study was extended to executive time?

A. I do not recall that it was. I think it was not.

Q. You do not recall having heard or having been given any facts at all concerning observations as to the allocation of executive time?

A. I do not remember seeing anything about executive time.

[fol. 175] Q. You do not recall seeing anything about

time spent by Borden executives on classes of customers?

A. Yes, I think there was some testimony with respect to the aggregate amount of time spent by managers and executives, as between the proportions of time that they spent on independents and chain stores.

Q. You did not see the Borden discount schedule at any time?

A. No.

Q. Now, do you recall what, if anything else, was done with the data that was assembled?

A. No.

Q. Other than what you have just described?

A. That is right.

Q. Do you recall reading any of the testimony with regard to the method by which routes were determined?

A. I saw none.

Q. Do you recall reading any testimony at all concerning the relative functions to be performed by the drivers and solicitors?

A. Yes, I think Mr. Malone testified with regard to that.

Q. What is your recollection as to the distinction of functions between the two?

[fol. 176] A. I understood the solicitors acted quite independent[ly] of the drivers and that they called only on independent stores and they did not call on the chains, as I recall it, and that the drivers merely served the customers who had been secured as a result of the efforts of the solicitors in the case of the independents.

Q. What was your understanding as to what the drivers did, if anything to increase sales?

A. I saw nothing with respect to that.

Q. You do not know whether they had the assignment of increasing sales, or not?

A. No.

Q. Do you believe commissions must always follow volume, even if the driver has nothing to do with influencing sales of the amounts delivered?

A. Lacking any other basis of allocation, I should think that volume—you would have to take volume in the absence of anything better.

Q. Irrespective of whether the person receiving the commission has anything to do with the quantity of the sales or deliveries?

A. I did not say that.

Q. Well, that is my question.

A. No, that isn't your previous question. Let me have [fol. 177] the previous question again. It is quite different.

(Question read by the reporter as follows:

"Q. Do you believe commissions must always follow volume, even if the driver has nothing to do with influencing sales of the amounts delivered?")

By Mr. Ball:

Q. Now, assuming that the driver has nothing whatever to do and no power to influence the amount of sales of deliveries but receives commissions, do you believe under those circumstances a commission should follow volume?

A. In this case I should think it would.

Q. Now, I am asking you to confine yourself to the facts assumed. Assume these facts and no others.

A. Oh, yes.

Q. Now, assume that drivers are delivering fluid milk, that they receive commissions based on the volume delivered, that they have nothing to do and no power to influence the amount delivered; do you believe that the commissions under those circumstances, exclusive of any [fol. 178] other facts you think may exist in this case, should be allocated on the basis of sales?

A. I do.

Q. It is your belief also that in Robinson-Patman Act cases a discount on a line of products must be justified product by product, is that correct?

A. No.

Q. Well, how?

A. I think that there are no "musts" in Robinson-Patman accounting.

Q. All right. Well, then, if you have a line of products and a discount is given on an entire line of products, when is it necessary to justify product by product?

A. Always.

Q. You read the Eggleston testimony, did you not?

A. Yes.

Q. Do you recall what the Eggleston testimony was about?

A. Well, he first told about his experience with Borden, different positions he occupied.

Q. Do you consider——

A. (Continuing)—Something more about the general [fol. 179] operation of the distribution of Borden products. In general that is about as I recall it. I recall some things specifically said.

In the latter part of his testimony, he said that it did not matter whether it was sold to chains or independents, the thing that was important was the volume and the size of the store. I remember that quite distinctly.

Q. And that was one of the facts you took into consideration in the opinions you expressed with respect to the Borden order?

A. Yes.

Q. Now, you have spoken quite frequently here of the differences between Robinson-Patman accounting and other accounting. What are those differences?

A. Robinson-Patman accounting is a specific application of the principles of cost accounting which cover a very broad field.

Cost accounting is a branch of accounting which is used to measure performance. It is useful to management in arriving at a comparison between parts of their business, between the results of their business at one time and at another and at arriving at the value of their inventory, [fol. 180] and also for control purposes of controlling operations and forming budgets.

Robinson-Patman accounting, however, has to do with the discovering of those differences in costs in serving competing customers which result from one of three things—quantities sold to the different customers, the methods by which they are sold, and the methods by which they are delivered.

Consequently, in Robinson-Patman accounting you deal with only a very specific and narrow phase of cost accounting generally.

Q. And that phase is not the kind that has any other management purpose, in your opinion, is that right?

A. Not directly, but it might result indirectly, but it is in my opinion a legal matter with an accounting application.

I think the accountant's function in Robinson-Patman accounting is to assist the attorney and I think that if there is any other application of Robinson-Patman accounting it is derivative, collateral, and incidental.

Q. In other words, in order to assist the attorney, the accountant must analyze what the law means, is that [fol. 181] correct?

A. He should have an understanding as to what is meant by the cost proviso in the Section 2(a) of the Robinson-Patman Act.

Q. And he must base his opinions on what is sound Robinson-Patman accounting on his opinion as to the meaning and purport of the Act then?

A. Based upon his knowledge of accounting generally.

Q. Yes, but he must base particularly his judgments and include in all of his judgments his understanding of what the law means, is that correct?

A. He should know, yes. I think the accountant in order to properly assist the attorney, should have some knowledge of the purpose of the Act.

Q. Well, isn't it true that since the cost defense under the Robinson-Patman Act involves accounting, that it is impossible for an accountant to express an opinion on a Robinson-Patman Act cost justification defense unless he embodies in his opinion his interpretation of what the law means by permitting the cost defense?

A. I should think he would have to read the Act and have some idea of what it means to an accountant, yes.

Q. And his opinion would be affected by the way he [fol. 182] interprets the Act, the meaning of the Act?

A. I do not know that he would interpret the Act. He would read it and try to understand it and certainly not ignore it.

Q. But he would have to form——

A. He is not practicing law, Mr. Ball.

Q. No. I understand.

A. Let us not get into that. I may be prosecuted by the bar for interpreting the law.

Q. But what I mean is, it is impossible for an accountant to form a judgment as to what is sound Robinson-Patman Act unless he first forms a judgment as to what is required by the Act?

A. Yes, sir, and I would like to give you an example, Mr. Ball.

Q. All right.

A. Because we are on very serious ground here. I certainly would be disputed by many accountants, as you would know. I think the accountant cannot ignore the fact that we are dealing with the price sold to one customer and the price sold to another customer, these two customers being in competition.

So he must know something about what is meant by a [fol. 183] customer, he must know something what is meant by competition, he must have some idea of what is meant by price, as well as some idea and experience of what is meant by cost.

Q. And he must have some—form some opinion of what is meant by reasonable allowance?

A. Yes, sir, that is very important, too.

Q. And due allowance?

A. That is equally important.

Q. Well, that knowledge or information enters into and helps to shape every opinion that he must express?

A. Yes, sir.

Q. Now, you made a distinction at one point in your testimony today that in one instance in management you want to find out the profit in serving a given customer and in another you want to find out the differences in costs. Aren't the two correlative?

A. No.

Q. All right. If I have a product cost and a cost of selling and delivering Customer A at a given price, I know what my profit is on serving him, don't I? Isn't that correct?

[fol. 184] A. Will you state that again, please?

Mr. Ball: Would you read that back, please?

(Question read by the reporter.)

By the Witness:

A. That is not Robinson-Patman, Mr. Ball, that is general accounting.

By Mr. Ball:

Q. Without reference to that, if I know my cost of serving Customer A, and I know my product cost, and I know my selling price, by mathematical computation I can tell what my profit is?

A. Yes, sir. That is cost accounting generally. You have expressed it very well.

Q. In that case one of the facts that I must know is the cost of selling Customer A?

A. Yes.

Q. Now, if I know the same points about Customer B, my product costs, my costs of serving him and my price to him, I also know my profit on Customer B, is that correct?

A. Yes.

Q. But in both of those cases, having found those facts, [fol. 185] I also know the difference in cost of serving those two customers?

A. Yes.

Q. And the second is Robinson-Patman Act, is that right?

A. No, sir.

Q. Well, if I know my differences in costs in serving the two customers, isn't that the information that is relevant?

A. No, sir.

Q. All right, why isn't that relative to Robinson-Patman?

A. Robinson-Patman only deals with one small segment of costs, only particular segments of costs. Most costs have nothing to do with Robinson-Patman at all.

You must identify the particular cost that is concerned, and show that that cost is of the order where differences in quantity, differences in method of sale, and differences in method of delivery would result in a difference in cost to a customer.

Q. Well——

A. We are only concerned with differences between differences in this area.

[fol. 186] Q. Now, if I know what my product is for Customer A and I know what my product cost is for Customer

B, I know what the difference is in product cost between the two?

A. Yes.

Q. And that is a factor—that difference is a factor that is relevant to Robinson-Patman?

A. No, sir.

Q. Difference in product cost?

A. No, sir.

Q. Well, it is your understanding of the Act, then, that differences in product costs are not a matter of justifying?

A. Some of them.

Q. Well, what are and what aren't?

A. Those which result from differences in methods, differences in quantity and differences in method of delivery, only those.

Q. And your opinions are shaped on that understanding?

A. My opinions for years have been shaped on that.

Q. Yes. Now, if I know what my costs of serving—or, put it this way, my costs of selling and delivering an item to Customer A are, and I know my costs of selling and [fol. 187] delivering Customer B are, I know my differences in cost selling and delivery between those two customers, is that correct?

A. Yes.

Q. Well, now, isn't that difference exactly what can be used to justify price difference under the Robinson-Patman Act?

A. If you can show these results from the particular items I enumerated, if they result from that.

Q. All right. Now, from what else can they result, Mr. Taylor?

A. I do not know. You would have to review all the circumstances of the case and see what they do result from.

Q. Well, isn't it a fact——

A. Because, you see, you can have differences between customers that do not result for any of the Robinson-Patman purposes.

Q. Well, give us an illustration.

A. Well, for instance, you may buy goods at a bargain, raw material at a factory where the rates of pay are lower. You may have public warehouses in one case, and your own warehouse in another. You may have so many, you can

[fol. 188] have many differences, very many differences, but that have nothing to do with Robinson-Patman.

Q. In your opinion then, in your understanding, those kinds of differences in costs dealing with one customer against the other could not be taken into account?

A. No, sir, because of the fact they do not come within the act.

Q. Therefore you are illustrating the fact that it is what you understand the Act means determines what you think comes under the Act?

A. Yes, sir.

Q. And for that reason you think that there are many differences in costs in serving one customer against another that in your opinion are not permissible to be shown as cost justification?

A. That is right.

Q. Now, applying that fact to the present case,

Mr. Ball: Off the record.

(Discussion had off the record.)

Mr. Ball: Well, that is all I have.

[fol. 189] Redirect examination.

By Mr. Long:

Q. Mr. Taylor, I show you a document that has been marked as Taggart Exhibit Bowman No. 2, entitled, "Documents for Review by Expert Witness," and I ask you to run down those. Would you look at those, please?

A. Yes.

(Witness examining document.)

By the Witness:

A. Yes, I see them.

By Mr. Long:

Q. Do you recall whether or not those were the documents that Mr. Woolley either brought to you or sent to you?

A. I believe they were. If you will tell me on this first one, "Transcript of Volume 8," what that is——

Q. This is 51 C 947, the number of our case.

A. Oh, yes. Transcript, Volume No. 8, what is that?

Q. Well, this is the Eggleston testimony.

A. Oh, yes. I saw that. Then the Government pre-trial order, Bowman Document, Wholesale Accounts, Store Manual, Tests, the Government's Cost Analysis Memos, Bergfeld Deposition, Bulk Wholesale Accounts, Bowman [fol. 190] Proposed Pre-Trial Order.

Yes, I saw those.

Q. All right, now, did you base your testimony upon these documents there alone?

A. Yes, among other things it was based upon that.

Q. Now, are the views set out in your proposed testimony your own views?

A. Yes.

Q. Despite the fact you had consultation with Mr. Woolley?

A. I contradicted him on some of the things and I agreed with him on others, but whatever is in there is all my own.

Q. I would like to ask you, do you recall, in answer to a question of Mr. Ball here, the transcript, Volume 8 of the Civil Trial No. 51 C 947, do you recall which one of these milk companies Mr. Eggleston was with?

A. I thought he was with—let's see, Malone was with Borden and Eggleston—gosh, I do not really recall.

Q. I guess that volume isn't down here. May he have been with the Bowman Dairy Company?

A. Could be. My recollection is not clear.

[fol. 191] Mr. Stevens: We object to Mr. Long, if he is trying to impeach his own witness.

Mr. Long: Well, I could refresh his recollection with the transcript.

By the Witness:

A. It has been a long time since I saw that, six or eight months, or more than that. My recollection on that isn't too clear. Eggleston? I would have to say I do not recall.

By Mr. Long:

Q. Now, let me ask you, Mr. Taylor, do you have any personal interest in whichever way these cases turn out?

A. It makes no difference for me. I am working for hire.

Q. Now, you, I think, testified too, that at the time you prepared your proposed testimony in the Borden and Bowman rebuttal, you had not seen these charts of Mr. Woolley's?

A. That is right. They came later.

Q. Now, have you seen these charts now?

A. Yes, I saw them in New York some little time ago.

Q. Would you want to change your proposed testimony in any way after having seen these charts?

A. No, sir.

[fol. 192] Q. Mr. Taylor, I show you the supplemental pre-trial order between the plaintiff and the defendant, Bowman Dairy Company, and I call your particular attention to Paragraph 27 of that pre-trial order, supplemental order, and ask you if you would read it over a little bit and tell me if you have ever seen that material or similar material.

(Witness examining document.)

By the Witness:

A. Well, this looks familiar. It shows experiences of Mr. Bergfeld. I remember that because I could not have gotten that any other place, I guess.

Mr. Stevens: Are you talking about Paragraph 27?

The Witness: 27, yes.

By Mr. Long:

Q. Does that all look familiar to you there (indicating)?

A. Yes, yes, that looks familiar, although when I saw it the ink, the color of the ink and type of paper, was different; otherwise I think this looks familiar. Yes, this looks familiar.

Q. Now, on Page 14 there, what is that a treating of [fol. 193] there?

A. This is the second assignment of Bowman in '48 where they were determining cost methods of the company.

Q. What kind of costing method were they using?

A. Well, I recall Mr. Bergfeld was telling about helping installing standard cost procedures, and I think he went to some length about what he did there with respect to standard cost procedures.

Q. Would your comments on that be the same as you have testified to at length here with respect to the distinction between a management cost survey and a cost study under Robinson-Patman Act?

A. Oh, yes.

Q. You would make the same criticism directed to that page there of the supplemental pre-trial order?

A. I think this is descriptive of Mr. Bergfeld's work which he made clear—at least it seemed clear to me, that he was assisting management with getting in systems that would be helpful to management.

Q. Might they not be entirely sufficient for a Robinson-Patman cost defense?

A. Well, some of it might turn out to be useful, but not directly applicable.

[fol. 194] Q. I show you, Mr. Taylor, the Borden defense pre-trial order and call your attention to Paragraphs 149 and 150, and I ask you if you have ever seen either that material or similar material?

A. Some of this looks familiar, and it looks like some of it I thought was similar to Mr. Malone's testimony. I do not remember it in this form.

Q. It seems similar to the Malone deposition?

A. The subject matter, yes, but the phraseology is not particularly familiar to me; no, sir.

Mr. Ball: What are you showing there?

Mr. Long: I am showing 149 and 150, 150 saying no time studies were made of the time of the executive and administrative employees in contacting the executive officers and other representatives of the chain stores.

By Mr. Long:

Q. Do you remember Malone so testified to that?

A. Oh, yes, I recall that, but, I mean, this particular document does not ring a bell for me.

Q. But the material rings a bell?

A. The material is familiar, yes.

[fol. 195] Q. Now, did you take that into consideration, those paragraphs in the opinions you have set out here?

A. The subject matter that is treated here I took into account.

Q. Would you suggest any other ways of ascertaining the costs of this executive solicitation of the chain store business other than estimates that I think you testified to yesterday?

A. I have had no experience with that except on the basis of estimates. It is a difficult thing at best and I think my experience has been that you largely would have to rely upon the basis of the subject's own opinion of his own time.

Q. Well, what is your opinion on use of other objective standards rather than subjective ones such as that?

A. You mean of general executives?

Q. Yes.

A. You mean like officers and branch managers, and things like that?

Q. And sales managers.

A. I have no experience with any objective standards.

Q. What would you feel about examination of their [fol. 196] travel accounts their expense accounts?

A. It could be useful. I have no experience with that.

Q. What do you think about a study of their correspondence?

A. That could be very helpful.

Q. Now, this matter of the allocation or the distribution of the costs of the executive officer soliciting chain stores, what kind of cost is that, direct or indirect?

A. It is a mixture.

Q. Now, to the extent that the mixture is direct costs, how would you in your opinion allocate it?

A. Like any direct costs, it should be allocated to those categories to which it directly applies.

For example, if a man spends half his time as a salesman, then half of his time and the related expenses of his office would be treated as any salesman's would be.

If the other half of his time was administrative, that would have to be treated as an overhead item. There again you have the matter of, as we talked about I think earlier in another connection, where you do have to divide a man

[fol. 197] in parts. Sometimes you do. I think this is another case.

Q. Well now, those applicable overhead might be tantamount or similar to the direct costs?

A. Well, I think that you would have some direct costs. You would have some of it would be direct cost, as I say, if he acts as a salesman for half of his time. Then you treat him as direct cost. The other half is overhead and you would have to have that allocated as you would other overhead.

It might be a thing that Mr. Ball was bringing out, there are costs that you cannot allocate and you just probably would throw it out and ignore it altogether. Chances are you would.

The case I am thinking about now in my mind the part that is not direct we would ignore because it does not produce a difference.

Q. Now, I just have one other question. I wonder, the many hypotheses given here by counsel for the Bowman Dairy Company with respect to the transfer of store customers from one route to another, how would that relate to a method of sales and delivery?

Mr. Stevens: I again object to your attempting to im-[fol. 198] peach your own witness.

Mr. Long: I do not think this is impeachment.

Mr. Ball: I think I would object to the form of the question as calling for the opinion of the witness on the matter of interpretation of the law.

Mr. Long: I think he can interpret it as an expert accountant here.

By Mr. Long:

Q. What possible relation would that have, dropping a customer, adding a customer, shifting him around there, the composition of the routes; how would that affect or relate to a method of delivery and sale under the Robinson-Patman Act?

A. I do not see how it would have any relation to a method of sale and delivery. By definition the two routes are handled by the same method.

Mr. Stevens: Are you through?

Mr. Long: Yes.

Recross-examination.

By Mr. Stevens:

Q. How would any commission charge be related to any [fol. 199] difference in method of sale or delivery?

A. I do not think it would.

Q. So then commission charges would be ignored for Robinson-Patman Act purposes?

A. No.

Q. Well, maybe I can just make a general question.

So that your answer to the various questions I asked you about commissions before would remain the same in spite of Mr. Long's question.

Put it a little differently: In answering Mr. Long's question, you did not intend to modify any of the answers you gave to the questions that I asked you, did you?

A. No, I was not modifying them.

Q. Mr. Long showed you various rebuttal exhibits which Mr. Woolley had prepared. How much time did you spend reviewing those?

A. Less than a day. I would say less than a day.

Q. For both the Bowman and the Borden?

A. You mean these memoranda?

Q. No, I do not mean Woolley's memoranda.

A. Oh, these things that came in later?

Q. That Mr. Long just showed you a minute ago.

[fol. 200] A. Yes, there were six of them. Oh, yes, I gave a little study to those. They were very interesting. How much time?

Q. Just approximately.

A. Oh, a couple of days at the most.

Q. I show you a chart which is marked Chart IV-B.

Mr. Long: Now, I want to enter an objection there. I do not know what you are getting at. Well, go ahead.

Mr. Stevens: It is just based upon your redirect examination. You asked him some question about these.

Mr. Long: Of course, I am going to object to his having to interpret or construe or give any opinion on Mr.

Woolley's work. If you have that in mind I am going to direct him not to give any opinion on Mr. Woolley's work.

Mr. Ball: You already asked him for that opinion.

Mr. Stevens: That is exactly why I have to do. You asked, you said, "This does not change any of your opinions?"

[fol. 201] Mr. Long: I am going to object if you are going to go minutely over all that material there. Go ahead and ask the question.

By Mr. Stevens:

A. I show you Chart IV-B of the proposed rebuttal pretrial order as to Bowman Dairy Company containing rebuttal exhibit folder B, being a chart entitled, "Bowman Chain Stores' Rebuttal Evidence, Relationship of Percentage Glass Containers to Number of Points Delivered Daily."

I will ask you if you know what that chart indicates.

Mr. Long: Well, I am going to object to that on the basis that you are asking the witness to interpret Mr. Woolley's work there and that is something, I think, that is more properly to be asked of Mr. Woolley. I do not think it throws any light one way or the other on this witness' proposed testimony here.

Mr. White: We can all stipulate Mr. Woolley's work does not throw any light on the case.

[fol. 202] Mr. Woolley: That is a matter of opinion.

Mr. Long: Mr. Woolley is going to testify to that.

Mr. Stevens: Will you read back the pending question, please?

(Question read by the reporter.)

By the Witness:

A. Well, this is a graphic chart on graphic paper showing the relationship of the per cent of glass containers to the number of points delivered daily.

Mr. Long: I move to strike the answer.

Mr. Stevens: On the same ground as your objection?

Mr. Long: On the same ground as heretofore made.

The Witness: Shall I continue?

By Mr. Stevens:

Q. Yes.

A. This shows the chart beginning at 50 points, at which there is a per cent of glass container delivered, which is the vertical scale. There is an average of five per cent across the board on one line—no, that is eight per cent. Pardon me. Eight per cent average for [fol. 203] all points.

There is a heavier black line showing a smoothed-out curve of the points, the scatter points here, running from fifteen per cent varying down and up to an ending of ten per cent on more than a thousand points averaged delivered.

At 90 points average delivered daily the chart shows about seventeen, at 100 about seventeen.

At 200, about, well, I will have to guess this, about eighteen, down to eight and nine on this scatter chart and the heavy line is drawn in between there.

At 300 down to about three.

400, about, let's see, ten, and so on, without going into the individual points of this scatter chart.

Mr. Long: I will, of course, again move to strike the answer as not being cross examination.

By Mr. Stevens:

Q. Now, would you like to Chart IV-A, and will you tell me if there is any significant difference between the line on that chart and the line on IV-B?

A. Yes, there is a more extensive line, vertical line of [fol. 204] glass containers delivered daily, and the horizontal line is the average points again in which you have a starting point at zero points of 24 per cent declining gradually to about thirteen, where you get down to about four per cent, I guess, rising to five, and so on, going through on this scatter chart in a smooth curve running out to a thousand points where it is at about the level of, I should say, twelve and a half per cent on a thousand average points delivered daily.

Q. As I say——

A. This is all with respect to a sample taken in September, 1955 on three routes.

Q. Can you identify any significant difference between those two charts? I know you have recited various figures, but is there any significant difference between them which might lead to any conclusion of any kind?

A. No, not offhand, like this. I draw no conclusions.

Mr. Long: I am going to, of course make the same motion to strike all the testimony on the basis it is not proper cross examination.

Mr. Stevens: All I am trying to ascertain, and I think it will be a fact, and I will ask it in the form of a conclusion——

[fol. 205] Q. Isn't it correct, Mr. Taylor, that you have not had sufficient time to review and analyze these various exhibits prepared by Mr. Woolley to determine their significance?

A. That is right. I have given it more study in the last five minutes than I had done before of those charts. It is the first time I have studied them to that extent.

Q. Mr. Long suggested to you that travel expense accounts might be useful to review in connection with studying the executives' time or duties in connection with various customer groups. You would not think travel expense accounts would be relevant for making such an apportionment among customers located in Chicago of the time of an executive also located in Chicago, would you?

A. No, sir.

Q. And I take it you understand that to be the fact in this case?

A. Yes, sir.

Q. Similarly, a review of correspondence files would not be particularly helpful in analyzing the time spent and personal calls or telephone calls by the executives, would it?

[fol. 206] A. If that were a fact. You are assuming that it was all done in Chicago. If it was all done in Chicago, there would be no traveling from Chicago, but, for instance, if an executive should have to go from here down to see Mr. Hartford in New York at the Graybar Building to negotiate a contract with the A&P, naturally, that expense voucher would be used for information to any accountant making an analysis. You could not ignore it.

All I said was that that sort of thing is all grist for the mill for the accountant.

Q. You did not mean to suggest that you could draw a standard from seeing how much money he spent on one customer, traveling to see one customer, and say that that is necessarily a fair measure for determining the allocation of his total account?

A. No. I said that is something you must take into account along with everything else.

Q. Just one other question. In your professional experience, have you had occasion to find any cost studies made for Robinson-Patman Act purposes in which the premium paid to wage earners was apportioned among customers on any different basis than the basic wages of the wage earner?

[fol. 207] A. I have no experience with that. I think you asked the same question before and the answer is the same. I do not have any experience with any situation where there are two bases of pay to be divided among customers, which I think is the question.

Mr. Stevens: That is all.

Recross-examination.

By Mr. Ball:

Q. As a matter of fact, the use of either correspondence or travel expenses of executives could be misleading and wrongful information, could it not?

A. Yes, sir. Like any other information, it has to be judged.

Q. And you do not have any knowledge of any facts here that would tell us whether those would be useful or not in any of these present cases?

A. No.

Q. It is also true, isn't it, when you spoke about direct and indirect costs, that indirect can be permitted to follow direct costs?

A. Sometimes that is done.

Mr. Ball: That is all.

[fol. 208] Redirect examination.

By Mr. Long:

Q. If, Mr. Taylor, the general offices of A&P were in New York, and that is where the contractor made the purchases of milk, then it would be important, wouldn't it, to look at the expense account in respect to considering that as a method of allocation?

Mr. Ball: Just a minute. I want to object to that on the same ground you have objected, because it certainly assumes as a fact something that is not a fact.

Mr. Long: It is certainly a part of this record that A&P is in New York there and Eggleston went to New York and Borden, too, to get that business there. That is a part of this record.

Mr. Stevens: When did that happen?

Mr. Long: Well, I am not testifying. The record will show that.

By Mr. Long:

Q. Of course, you are answering Mr. Stevens' question on his assuming of facts, and that was that the purchasing agents were here in Chicago, is that correct?

A. No. He cited a case where everything was done in [fol. 209] Chicago and there would not be traveling, and I said certainly that was a fact if that were so.

Q. Let me ask another. Let me ask you on another subject, would you tell us briefly what is the purpose of a warehouse?

A. To have goods in quantities when they're wanted and where they are wanted.

Q. And what utility does it provide for customers?

A. Ready access.

Q. Do I understand your testimony that you are drawing an analogy that those costs should be assigned on the basis of space or bulk?

A. I believe it usually is.

Recross-examination.

By Mr. Ball:

Q. Was it your understanding, Mr. Taylor, that in the present case contracts were negotiated between Borden and A&P in New York?

A. I had no knowledge of that.

Recross-examination.

By Mr. Stevens:

Q. I have two other questions now. You say that warehousing costs are assigned on the basis of space. Isn't that [fol. 210] always conditioned on the amount of time and the spaces occupied by the customer?

A. Yes, I think I testified to that earlier, weight and space and time. I think I said that before.

Q. And on the—well, let's forget it. Thank you.

Mr. Long: "And further deponent saith not."

(And Further Deponent Saith Not.)

Subscribed and sworn to before me this — day of May, 1958. ——, ——, Notary Public.

[fol. 211] Mr. Long of the Anti-Trust Division furnished the Official Court Reporter with the following information:

Professional Services Rendered by the deponent, Otto F. Taylor, 92 hours, for the period from May 28, 1957 to September 24, 1957.

[fols. 212-213] Notary public's certificate. (Omitted in printing)

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendants

Deposition of Elliott B. Woolley—Filed February 13, 1959

The deposition of Elliott B. Woolley, called by the defendants for examination, pursuant to agreement of counsel for the respective parties, and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, taken before Paul A. Ruhe, a notary public within and for the County of Cook and State of Illinois, in Room 758, United States Courthouse, 219 South Clark Street, Chicago, Illinois, on Monday, June 23, 1958, at 1:30 o'clock, p.m.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

[fol. 2] Mr. Edward L. Hart, Jr., and Mr. John P. Stevens, on behalf of the defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

Mr. Stuart S. Ball, and Mr. Joseph Greaves, on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 3] ELLIOTT B. WOOLLEY, having been first duly sworn, deposeth and saith as follows:

Cross-examination.

By Mr. Ball:

Q. Mr. Woolley, in your Paragraph 15 of the proposed rebuttal order, you speak of something of your past history. Have you at any time had any previous experience in Robinson-Patman cost studies?

A. No.

Q. You are not, I take it, an accountant?

A. Not in the fullest sense of the word. I have had accounting experience, accounting studies.

Q. Will you describe what your accounting experience has been?

A. I have studied cost accounting and graduate work, not in the sense of a practicing accountant, if that is what you mean, not a CPA.

Q. Have you had occasion to familiarize yourself with the bookkeeping practices in corporations generally?

A. Only in the general sense that I became acquainted with them in the course of the studies in general accounting that I have had, in the course of the academic work that I [fol. 4] have had. As you realize, of course, my experience has been with the Government since I left school, and I haven't had any work.

Q. Primarily your experience has been as a statistician?

A. And an economist with the Department, yes, sir.

Mr. Stevens: Could you speak a little bit louder?

The Witness: Yes.

Mr. Jinkinson: Just speak up.

By Mr. Ball:

Q. I am always a little puzzled to know just what is meant as an economist, Mr. Woolley. Perhaps you can define it.

A. Well, an economist is one of the students of social sciences who are concerned with the general operations of the economy and in the general broad sense with the prob-

lems of production, supply, demand, distribution, and so forth.

Q. Are you particularly concerned with the field of economic theory, with the measurement of economic phenomena?

A. Well, I have had experience in both. Those are subcategories of the general field of economics.

[fol. 5] Q. Your activities then are concentrated primarily in those fields, are they not?

A. More or less as applied to the practical problem arising in the work of the Government service.

Q. Now, over on Page 33 you state, and this was prepared, of course, before the depositions of Messrs. Taggart, Sawyer and Taylor were taken, that you agree in substance with the controlling principles of cost accounting and their application to the Borden cost defenses as stated in the testimonies.

Now, having heard their testimonies on deposition, are you still in agreement with all three?

A. I see no reason to change my views. I see no reason to feel that they have more or less altered their views.

Q. You feel that as far as you can determine their views are consistent one with the other?

A. More or less.

Q. Are there any points of differences that you have with any of them?

A. Now?

Q. Yes, now.

Q. Or originally?

[fol. 6] Q. Now.

A. Well, in general substance I don't think so.

Q. Well, in particular. I am particular anxious to know if there are any aspects of their testimony with which you are not in agreement?

A. That is kind of a hard question for me to answer because——

Q. Let me ask as preparatory questions, you were present at all three of those depositions?

A. Yes.

Q. You have read the transcripts of those depositions?

A. Yes, I have.

Q. They covered quite a bit of ground?

A. Yes.

Q. They did bear upon the material that you were preparing in this case?

A. Yes.

Q. Now, is there any point at which in detail they deviated from the position that you believe to be proper?

A. As far as Mr. Taggart is concerned, Professor Taggart is concerned, I don't believe that there is anything that I could say that he deviated in any significant degree. [fol. 7] As to what my views have been with respect to Mr. Sawyer, offhand I can't recall at the moment.

Q. What about Mr. Taylor?

A. Mr. Taylor, I think he and I are closer now than we originally had been, with respect to the transportation costs, and so forth.

Q. Now, will you give your recollection of the communications that you had with Mr. Taggart prior to the time of the deposition that was taken of Mr. Taggart?

A. I presume you mean in terms of my approach with him?

Q. Oral and written communications. When did you see him and how much time did you spend?

A. I recall, last May, 1957, Mr. Long and I went to New York for the purpose of enlisting the aid of the F.T.C.

Mr. Jinkinson: Washington.

By the Witness:

A. I beg your pardon, Washington, D. C.

Mr. Jinkinson: I want the record straight. Washington.

[fol. 8] By the Witness:

A. For the purpose of enlisting the aid of the F.T.C. to recommend to us any experts they felt might outline the problems we had.

By Mr. Ball:

Q. Well, did you communicate with the F.T.C.?

A. Mr. Lund——

Q. Is he the head of the accounting section?
A. Yes, sir.

Mr. Long: Lundbahl.

By the Witness:

A. Lundbahl and his two assistants.

By Mr. Ball:

Q. Do you recall them——
A. I should know him, because he is a friend of mine, Melvin Steel. Do you recall, Bert?

Mr. Long: Not for the moment, no.

By Mr. Ball:

Q. Did you discuss your problems with these gentlemen?
A. Yes, I did.
Q. Did you ask their views about any of these specific matters?
A. After reviewing the outline—after outlining the prin-[fol. 9] ciples I was interested in, I asked their viewpoints and they seemed to be in general agreement. There are a few minor matters which they couldn't go along with.

After that we asked them if they could, or if they could recommend anyone who might conceivably be interested in assisting us in this matter, in these matters of accounting principles along the lines we outlined and they gave us these three brethren.

Q. Did they name the other three members of the Taggart Committee?
A. No.
Q. They recommended these three of the Committee?
A. Yes. Then after that conference I got clearance to go to New York. I phoned Mr. Sawyer and Mr. Taylor from Washington. Made a date with them for the following day, I think it was, and to meet with them to discuss these matters.

And then I came home from there, directly home. I didn't see Mr. Taggart en route. I came home and discussed with Mr. Jinkinson the results of the trip, and requested permission to go to see Professor Taggart, which was granted.

[fol. 10] And I think we phoned Mr. Taggart at that time to make an appointment, if I remember right.

So then I went to Mr. Taggart. I think it was around the 28th of May, somewhere along in there, the last part of May.

Q. Did you prepare a memorandum at that time on the facts?

A. Yes. As far as my review of the Borden Cost Study, I had previously prepared my reactions to it in a memorandum form. I submitted them to Mr. Jinkinson, which is the ordinary course of my relationship with the staff.

Q. Now, when you saw Professor Taggart, did you give him a copy of this memorandum of yours?

A. I didn't give it to him, no. At that particular time I made two trips—I made three trips as a matter of fact. I went up there the first time——

Q. To arrange for his employment?

A. To discuss the problem with him to start with, to get his reactions to it and, yes, I took my memo with me, I believe, at that time and showed him in general, to give him an idea what I was after, to see what his reaction [fol. 11] would be to the problems I had in mind.

Q. You supplemented that with the oral statements?

A. Yes, at that time. Then I returned home——

Q. Just a moment.

A. Excuse me.

Q. At that time in your oral statements did you tell him your understanding of the facts concerning——

A. Yes, I did.

Q. —concerning the Borden matter?

A. As far as they were relative to the particular points I had in mind.

Q. As far as you felt they were relevant?

A. As far as I felt they were relevant.

Q. Do you recall specifically what you told him about the facts?

A. A year and a half ago, two years, well, I outlined to him—incidentally, I had a copy of your material which you submitted to us.

Q. And specifically at that time that consisted of what?

A. Pardon me?

Q. Specifically at that time the Borden material consisted of what?

[fol. 12] A. That pre-trial preliminary draft of what now is your pre-trial order. It had—and plus those, that cost study that was being added as a part of it later. At that time, of course, they were separated, the brochure of the cost defense itself.

Q. That was the black-bound book?

A. That was the black-bound book. It was either that, or I had this preliminary draft in which you had already incorporated that cost study within the proposed pre-trial order. I am not sure.

Q. You don't recall which it was, do you?

A. I have forgotten. Anyway, that is what I took with me.

Q. Did you have the Malone deposition with you?

A. At that time, no. That was furnished subsequently. Then I reviewed——

Q. It is impossible for you, is it not, to remember exactly what you may have said about the facts of the case to Professor Taggart?

A. It is difficult. In general I reviewed the—as I understood the material, the basic method of allocation, types of cost to be included and, of course, my reactions with it.

[fol. 13] Q. Did you discuss with Professor Taggart at that time the contracts of the union covering the compensation of the employees?

A. I may or may not. I don't recall that. I know it was covered later. This second—pardon me. This second visit was primarily to turn over documents.

Am I talking about the first or second?

Q. You are now talking about the first.

A. The first one——

Q. How long was your first interview with Professor Taggart?

A. That first interview—oh, wait a minute. I beg your pardon. That first interview with Professor Taggart was with Mr. Jinkinson and I when he and I were together.

Q. How long did that last?

A. That lasted from about ten to 12:30, 1:00 o'clock, something like that, somewhere along there, about a couple

of hours. Then I came back and then I went back. Now we are talking about the second.

Q. The second visit, how long were you with Professor Taggart?

A. I was with him, oh, the best part of the day, about [fol. 14] nine to three or four, until the train left, around four o'clock that afternoon.

Q. You had an extensive discussion with him?

A. The purpose of that second visit was to turn over to him those documents listed in that exhibit you queried him about.

Q. When was the third interview?

A. It was in—let us see, this would be June. I think towards the end of July. He had these documents about a month, roughly.

Q. That interview took place at Ann Arbor?

A. Yes. The third one did, yes. Where I went to pick it up and also I spent two days with him to review—he prepared a brief summary of his reactions to both—well, it is strictly to Borden. To Borden's Cost Defense and the material I submitted to him including the Malone deposition.

Q. You spent two days with him at the time of this third visit?

A. Yes.

Q. Most of the two business days?

A. Yes.

Q. Were you with him in the evening?

[fol. 15] A. No.

Q. Well, did you have any other interviews with Mr. Taggart?

A. Since that time, no, other than at the time of the depositions.

Q. After the first day in which we were taking his deposition, did you have a visit with him in the evening prior to the second day of his deposition?

A. No.

Q. Now, during the course of these various meetings you reported to him from time to time all of the relevant, all of the facts that seemed to you relevant that you knew about?

A. What do you mean reported?

Q. You commented or stated to him——

A. During the course of his interview?

Q. —all of these conversations?

A. During the course of his review during that month of July that he had material?

Q. No, during these three interviews that you described?

A. Yes.

Q. You stated to him from time to time those facts that [fol. 16] you thought might be relevant to his consideration?

A. We discussed the question of the commissions and we discussed the question of payments of drivers' wages. We discussed the question of transportation costs.

Q. You did state in those discussions what you understood the facts to be?

A. Yes, referring to the pre-trial order from time to time to make sure we were right.

Q. But based upon also such information as you had gleaned from the deposition?

A. We didn't use the deposition too much. I mean, in our discussion we didn't.

Q. And such other information as may have been given to you, communicated to you orally in response to the requests that you have made of us for information?

A. Yes.

Q. And of course this distance and passage of time, it would be impossible for you to remember what the facts were as you stated to him in the course of those discussions?

A. Well, the specific words perhaps it would be, the [fol. 17] general ideas, perhaps.

Q. Well, could you for instance say whether or not you did discuss with him the terms of the union contract between Borden and the——

A. Only to point out the nature of the commission formula indicated therein which we discussed somewhat.

Q. Do you recall specifically what you told him the nature was of that formula?

A. I showed him the contract. He looked at it and discussed it and of course he could see from the face of it what the nature of it was. The question there was between us. I had raised this question about allocating commissions

on a volume basis. His first reaction was he didn't think, unless I could show some substance back of it, just on a mere form, he didn't think he would quite agree with me. So to that extent as a result of the discussion with him on the principles that might govern the question of allocating commissions I revised my own concept, broadened it to include his thought, if you could show or demonstrate incentive for the purpose or objective that these commissions [fol. 18] were paid, that should be the most reasonable basis for allocation.

Q. In other words, you and he reached the conclusion that the only reason why commissions should be allocated on the basis of sales is when you show that the payment of the commission was an inducement to the employee to take some steps to increase the volume of his sales, is that correct?

A. That would tend to fall from the concept of incentive, if that is the purpose of the payment.

Q. And in other words, your belief, stating it this way, the opinion you expressed in the proposed pre-trial order and I think that is specifically covered over here on—I am looking particularly on Page 35, the basis of the proposed draft of the pre-trial order or rebuttal order, and beginning on the previous page.

A. Yes.

Q. It is because it is your understanding and belief that the payment of these commissions induces the employee to take some action to increase sales that you allocated the commission on the basis of sales?

A. That is right, plus the nature of the contract, the elements in the contract we conceived to be relevant.

[fol. 19] Q. What are the elements of the contract that you conceived to be relevant, Mr. Woolley?

A. Turning to Exhibit N, rebuttal Exhibit N, specifically Article 42-E with respect to sub-paragraph E, commissions on wholesales I understand is the one that is relevant to the drivers we are talking about.

[fol. 20] Q. In other words, looking at Article 42-E and that is the section upon which you reach your conclusion that the commission should be——

A. Yes.

Q. Are there any other sections that you believe are relevant on the matter?

A. Over here, I believe there is one considering Article 4 wherein it says:

> "In case the route is too large to be run within the proper time schedule adjustments when warranted shall be made within two weeks by employer so that such route can be properly serviced within the forty-five hour week. If adjustments are not made within two weeks after the request is made by the union representatives such shall be considered in violation of the agreement."

Q. How do you think that bore upon the question of allocation of the commissions?

A. The union, as I understand it—I will stand corrected if it is not quite accurate, but the information I have [fol. 21] available to me, they have over here in Article 42-E established a progressive rate of payment over the first twenty-four hundred points of 75 cents per hundred up to the first four thousand, then, of course—then over that 90 cents per hundred. To me that is quite an incentive to enhance volume right there by itself. And it seems to me that the reason why, one reason they might have required to put in this particular paragraph, Article 4 would be to attempt to neutralize somewhat the apparent growth that would result from the application of this commission.

Q. You stated that you based that partly on information you had about the union?

A. Yes.

Q. What was the source of your information?

A. I understand from talking to counsel that perhaps—I don't know this for a fact, of course,—I have been advised by both sides here, not you, particularly, but perhaps the history of this thing has another purpose back of it which would be a volume concept.

Q. Now, do you recall specifically what was said to you [fol. 22] by any counsel or anybody else?

A. I understand that this commission business was instituted historically to sort of neutralize this store-home delivery proposition, home delivery problem. That is my understanding.

Q. You don't recall offhand what source you received that information from?

A. That is purely conversation between counsel.

Q. Did you report that fact to Mr. Taggart?

A. No.

Q. Or to Mr. Sawyer?

A. No.

Q. Or to Mr. Taylor?

A. No. Actually, at that particular time a year ago I wasn't aware of that history. That is something that has developed since.

Q. Did this fact that you just now recited enter into your own appraisal of the statements that are included in the rebuttal?

A. To me it strengthens my current thinking on that.

Q. To put it this way: Is that one of the facts upon which you are now basing your opinion?

A. It is an added factor, I think, that I can conceive of [fol. 23] being relevant and strengthens the proposition.

Q. Now, you quoted from a passage from Article 4. I am not entirely clear how you felt that that bore upon the question of the allocation of these costs?

A. If they left Article 42 alone it seems to me these drivers would have a tremendous incentive to increase their volume of sales to the stores, these particular kind of drivers.

Now, either the union or the company—I don't know which—offers Article 4 as apparently a limit, some unspecified limit on the size to which a route would grow, as it otherwise would under Section 42-E, and in order to keep the income level, I presume, between routes as much within reason as possible, they put a limit on these routes in order to hold them down, to spread the work a little, maybe.

Q. Is it your understanding that this provision which you read from Article 4 of the contract was inserted at the employer's——

A. I don't know.

Q. —insistence?

A. I don't know. It might be on the basis—might both [fol. 24] of them have an interest in it, I would think. The company would have an interest in tending to hold the cost down, and the union would have an interest in spreading the work around.

Q. These are the only two, this passage from section 4 and section 42-E, are the only sections of the contract that you considered are apropos?

A. At the present time.

Q. At the present time, as bearing upon your opinion that these commissions should be allocated on the basis of sales?

A. At the present time.

Q. Now, what are the facts upon which you base your assumption that the employees have some ability or their opportunity of increasing the volume of their business on their routes?

A. First of all, it is the graduated rates of the schedule. Secondly, they have opportunity to observe growth and development in the community in which their route is operating and could very well bring that to the attention of the solicitor or whoever is responsible. They might even go and ask themselves and solicit, the drivers, the prospective customer himself.

[fol. 25] Q. Do you have any information that either of those things has ever been done?

A. No, I don't.

Q. But you, in your opinion and judgment here, you have assumed that that is likely to be done, is that correct?

A. I don't know whether it is likely or not, but at least it has a possibility and within the realm of reason.

Q. And it is your opinion that the 42-E provisions of the contract are to induce the employee to do that, is that correct?

A. I would think so. If I were a driver, I would, if I could get by with it.

Q. You make that assumption in reaching your conclusion as to the allocation?

A. It is one of the factors that enter into it.

Q. All right, now, go ahead and state the other factors?

A. And in conjunction with the contract and his opportunity to talk with the store managers and independents particularly.

Q. All right, what would be the conversations with the [fol. 26] independent store managers, how would that affect their compensation?

A. He would ask the store manager presumably whether or not he would want more milk than he was going to leave. He might influence him as to the type of products he might want to leave there. If he was not taking the whole line he might talk with him about the advisability of increasing his spread and types of products to be delivered.

Q. Do you know of any independent stores that don't take the whole line to the needs of their community of fluid milk products?

A. What do you mean needs? What do you mean?

Q. You know what we are speaking about fluid milk?

A. Yes. I have seen plenty of independent stores that don't take chocolate milk, for example. Why they don't, I don't know.

Q. You don't know whether that is a matter of customer demand, or not?

A. Possible. That is a factor.

Q. Will you describe what is your understanding of how the driver could really increase the amount of sales by conversation with the manager or owner of an independent [fol. 27] store in view of the fact that any fluid milk products not sold are returned and netted against the sales of the next day?

A. Supposing he should be able to induce the customer, supposing a holiday coming up, and he is suggesting he increase his volume in the store and the customer agreed. Supposing he raised it 20 per cent. Supposing he sells the whole additional 20 per cent. He has then increased the sales through his suggestion to the store, even though he returns the normal amount.

Q. Well, just a minute. Merely putting more milk in a store icebox won't increase the sales of that store any, will it?

A. It is possible.

Q. You assume that merely putting more milk——

A. If the customer himself gets the price, decides to reduce the price to make it more attractive, and use it as a leader, whatever you might.

Q. Putting aside whatever the customer might do in cutting the price of milk, is it your assumption implicit in what you have stated in this rebuttal order, that if a driver can induce an independent store dealer to accept 20 per cent

[fol. 28] more milk on a day's delivery, that that will affect the sales that that store makes to the ultimate consumers?

A. It might.

Q. Just how do you assume that it might affect that?

A. That 20 per cent might be in anticipation of a general holiday or something like that, anticipating, which the store manager might not have conceived of making provision for.

Q. Putting aside holidays or any special occasion, that on Wednesday, assuming deliveries to that independent Monday, Wednesday and Friday, that on Wednesday the driver suggests he leave 20 per cent more milk of various kinds in the refrigerator, what would be the effect as you view it, on the net sales made by the dairy company to that particular independent store?

A. It might increase ten per cent.

Q. Just why would that under those circumstances increase the sales, allowing for the returns of unsold milk?

A. Why would it?

Q. Yes.

[fol. 29] A. It might happen to be an increased demand at that time.

Q. But merely putting the milk in the store would not increase the demand of the customers of the store?

A. No.

Q. You recognize that?

A. Obviously any control of supply has to take into account the prospective demand that you are going to meet.

Q. So it would only be if there were a difference of opinion between the store manager and the driver as to what his anticipated demand would be——

A. Perhaps.

Q. That it would affect, that the effort to need more milk would affect the amount to be sold, actually?

A. If the independent store manager is at all concerned, some of them may not be concerned, and leave it up entirely to the driver.

Q. You don't know, as a matter of fact, whether the independent store manager ever does anything more than leave it up to the driver?

A. No, only what has been recorded in Mr. Malone's deposition.

[fol. 30] Q. But in reaching the conclusions or opinion that you have expressed in this rebuttal pre-trial order, you make the assumption that the driver can increase his net sales by leaving more milk in the stores?

A. He has that potentiality.

Q. It is upon that basis you believe that the commission should be allocated?

A. Yes, sir.

Q. On the basis of sales, allocated on the basis of sales?

A. Yes, or volume.

Q. Sales volume, put it that way?

A. Yes, volume delivered.

Q. Now, going back to your meeting with Mr. Taggart, did you have any interim inquiry in writing him for additional facts or additional information?

A. No.

Q. Did you write him any letters in the interim stating additional facts?

A. No. I presume you mean by that up to and including the last time I met him?

Q. That is right, yes.

[fol. 31] A. While he was supposedly reviewing the material.

Q. Prior to the time his part of the pre-trial, proposed pre-trial order?

A. Prior to that time, no.

Q. How long a memorandum was this that you handed him that you had prepared?

A. Around fifty-five pages, if I remember rightly.

Q. Fifty-five pages?

A. Somewhere around there, much more than the expert testified to.

Q. Now, will you describe what factual information you stated in that memorandum?

A. I gave a description of, first, the kinds of cost elements covered in your pre-trial order, a description of the details and methods by which those categories and costs were allocated to the customers or customer classification, emphasizing, of course, those particular points which I find at issue in my mind.

Q. That included the matter of allocation of commissions?

A. Allocation of commission, allocation of transportation costs.

Q. Now, with respect to the allocation of commission [fol. 32] that memoranda stated what you understood the method of operating——

A. Yes.

Q. —was?

A. Yes.

Q. That included information that you may have gathered from some of these conversations with counsel or the witnesses that you have mentioned, is that correct?

A. Would you restate your question?

Mr. Ball: Will you read it, Mr. Reporter?

(The last question read as recorded above.)

By The Witness:

A. What testimony do you mean, Mr. Malone?

By Mr. Ball:

Q. You mentioned that you did get various impressions of facts from conversations that you had had at various times with some of counsel and some of the witnesses, is that correct, that are not included in the deposition itself?

A. As to witnesses, you mean Mr. Malone?

Q. Specifically Mr. Malone, yes.

[fol. 33] A. I didn't want to get the impression you are talking about the expert.

Q. No.

A. Yes, O.K., but based mostly on facts that I found.

Wait, let me back up a little. As to your question when I was writing the memo?

Q. Yes.

A. That was based solely on this pre-trial order, information I have been furnished from counsel. As far as the writing of the memo is concerned, for the preparation of that memorandum, I had no access at that time excepting for clarification purposes in our conference.

Q. Yes. Well now, let me state it this way:

In writing this memoranda you based it upon your interpretation of the draft of the pre-trial order and the documents that have been furnished you, together with such enlightenment as you had had from the various conferences of counsel concerning it?

A. Yes.

Q. Does that express it correctly?

A. Yes.

[fol. 34] Q. It stated your understanding of the factual background as derived from those sources?

A. I am trying to recall the sequence of events here. I am trying to segregate the sequence of events. In the preparation of my memorandum, the usual procedure in our office is this: Mr. Jinkinson received from you these brochures which you proposed as your cost defense here, as far as the facts were concerned. I was given that document by Mr. Jinkinson and told to review it and see whether or not I could agree with it. That I did. That memorandum coming out of that work at that time did not reflect any consultation that we may have had subsequently with you and Mr. Malone.

Q. Which was a memorandum that you gave to Mr. Taggart?

A. That one I am talking about plus Mr. Malone's deposition, your abstract of it.

Q. Subsequent then to the preparation of that memorandum you did attend the deposition that was taken of Mr. Malone?

A. Yes.

Q. And you were furnished various additional informa-
[fol. 35] tion?

A. Yes.

Q. As the result of inquiries made?

A. Yes.

Q. Now, do you recall whether any of that subsequently received information or the facts from Mr. Malone's deposition affected or changed any of the statements that you made in that memorandum?

A. I don't believe so at this moment.

Q. As a matter of fact, presently you do not remember exactly what the contents of that memorandum were in detail, do you?

A. Only what I have outlined in a general way.

Q. You have given a general outline but the specific way in which you phrased anything, you can't recall at this time?

A. No, not without referring to it.

Q. You stated something which was more or less a conclusion of yours as a fact or not, you would not be able to tell us at this time?

A. At this time I would hesitate unless I had the memo before me, which I don't.

Q. And I take it——

Mr. Ball: Mr. Jinkinson, the position of the Government [fol. 36] is that we will not have the memo in front of the witness then to refresh his recollection?

Mr. Jinkinson: That is right, Mr. Ball.

By Mr. Ball:

Q. Now, you had several visits with Mr. Sawyer and with Mr. Taylor. Will you give us the length of time and the nature of those?

A. As I stated before, preliminary to Mr. Taggart's visit, I had arrived in New York, if I recall, around the 20th of May or something like that and visited with Mr. Sawyer first in the morning, and Mr. Taylor in the afternoon, doing the same thing which I have subsequently done with Mr. Taylor; namely, outline the problem that I had.

The purposes then, enlistment of their services and observing their reaction and getting them in agreement more or less after discussions with intent to help us out in the matter.

Q. You didn't see the two of them together?

A. Oh, no; Oh, no. I said Mr. Sawyer in the morning and Mr. Taylor in the afternoon. Their offices, incidentally, are at the end of the island, and the other at 42nd Street.

[fol. 37] Q. Taggart and Taylor, or I mean Sawyer and Taylor?

A. Sawyer is down south and Taylor is up north, about five miles apart.

Q. Now, at that time did you give them any documents?

A. No. I showed them in the course of the conversation with them, outlining my problem. I, of course, referred to my memo, referred to the pre-trial order and after those interviews returned home.

Q. How long were your interviews?

A. About an hour and a half, to two hours.

Q. Now, when was the next time you saw these two gentlemen?

A. That was in, after I had returned the documents, gone to Taggart's, returned, picked up the documents to bring them back. I think about a week later, sometime the first part, no, around the end of July or first part of August. I went on my vacation in August. So I made the trip to New York, turned over the documents to them so that they would have the month of August to review for this purpose.

Q. How long a discussion did you have with these two men in connection with the turning over of these documents?

[fol. 38] A. If I remember rightly, a half a day each. I arrived on the morning train and left on the evening train.

Q. It could have been, however, a day apiece, could it?

A. Not at that time. I know a day apiece was after I went back to review and discuss with them in September the results of their review.

Q. At that time you spent about a day with each of them?

A. About a day with each of them.

Q. And your conversations with those two gentlemen followed much the same pattern of the conversations you described with Professor Taggart?

A. That is right.

Q. You discussed back and forth the problems and also the facts as you understood them?

A. Yes.

Q. And at that time you discussed with them and mentioned your understanding of the facts as derived not only from the original cost brochure but from the Malone deposition and your conversations with counsel and witnesses and [fol. 39] the information you had?

A. Yes.

Q. Again, I assume you could not at this time recall or state what particular factual statements you may have made to either of these gentlemen?

A. That is right, specifically.

Q. I take it that you discussed with both of these gentlemen the problem of these commissions?

A. Yes.

Q. You stated to both of them your understanding that the contract provided and induced activities on the part of these drivers to increase the amount of their sales, is that correct?

A. I mentioned the problem. I raised the questions we have. That seems to harmonize with you on that matter.

Q. We identified, I believe, as Taggart Deposition Exhibit No. 1 for identification, the cost justification report prepared by the Taggart Committee. I take it you are familiar with that report?

A. Yes.

Q. When did you first run across that report, Mr. Woolley?

A. About two years ago in connection with this case [fol. 40] when I was assigned to it, brought to our attention, shortly after it came out.

Q. That was before your visit with Professor Taggart?

A. Oh, yes.

Q. You studied over this cost justification report?

A. I have reviewed it.

Q. Are you in agreement with all of the positions taken?

A. In general principles, I suppose.

Q. Well, specifically, are you in disagreement with any part of this report?

I am trying to shorten this deposition rather than going through it with the other gentlemen, in finding out whether you have any points of specific difference.

A. No.

Mr. Long: Is this about the time of our recess?

Mr. Ball: Yes.

Mr. Long: Mr. Woolley might need a drink of water.

Mr. Ball: All right.

(Recess taken)

[fol. 41] By Mr. Ball:

Q. Well now, when I asked you about this cost justification report I am also referring to the appendix A. I take it you have no difference with the points that are brought out in this appendix, either?

A. No. These are general principles, and as general principles I haven't any serious objection.

Q. You accept all of these principles stated here?

A. Yes, in terms of principles.

Q. Now, if you will turn to Page 34 of this proposed pre-trial order, I notice you say each truck has a volume capacity in which all of the amounts of fluid milk could be delivered on that day on the truck were carried.

What do you mean by that, Mr. Woolley?

(No response)

Q. Do you mean that all trucks have the same volume capacity?

A. That is a general statement which is descriptive nature of the truck. That is the capacity in which the fluid milk can be delivered. It may vary from one size truck to another.

[fol. 42] Q. Do you know to what extent on the various routes the volume is used of the truck?

A. You mean the capacity that is used?

Q. The capacity used?

Mr. Long: No. We are going to object to that question because Mr. Woolley can answer but that is something that is outside of this record.

Mr. Ball: I am asking him if he knows.

Mr. Long: No.

By the Witness:

A. From what I have observed, some of the trucks I have seen drive up to the stores out in our area, they are not loaded to the top, no.

By Mr. Ball:

Q. And have those been Borden trucks?

A. Some of them have, yes. And some of them Bowman.

Q. In other words, you have yourself occasionally seen a Borden truck and watched the process, is that correct?

A. Just in a general way.

Q. All right, has what you have seen in those situations entered into your appraisal of the facts in this particular [fol. 43] case upon which your opinion has been based?

A. I would say only in a general way, the fact I know the truck has a given capacity in which obviously for the purpose of the truck is to carry this volume of goods from the point of origin to point of destination. It may or may not be loaded to capacity at that particular point.

Q. What I wanted to say, what are the circumstances under which you have seen a Borden truck operating?

A. Oh, when I went to the store in the morning to get some milk or something.

Q. What particularly did you observe, was the store—or was the truck parked outside of the store?

A. Yes.

Q. Did you look in there?

A. A chain store, for example, an A&P.

Q. You purchase at the A&P, do you, Mr. Woolley?

A. I do, on occasion. My wife likes to purchase at the A&P. Right now we are buying from the National though.

Mr. Jinkinson: That is just linking up the record.

[fol. 44] By Mr. Ball:

Q. Did you look into the rear of the truck on any of those occasions?

A. I looked in through the driver's area. No, I have not made any specific detailed survey of the truck, no.

Q. What I am trying to get at is to what extent, has what you saw at that time been reflected in what you say in this proposed pre-trial order?

A. Just in a general way.

Q. You did gain the impression, however, that the trucks are loaded fairly well to capacity, is that correct?

A. Some of them were and some of them were not at the time I saw them but maybe up later in the afternoon they might have been further along the route. I don't know precisely.

Q. Well, looking at Page 34, did you make the assumption there that these trucks are ordinarily loaded fairly well to capacity?

A. Not necessarily, no. I don't think that question is relevant.

Q. I am trying to figure out just what you mean that each truck has a capacity?

[fol. 45] A. Just the fact that it has a square box on wheels with a given cubic content.

Q. Yes. Under what circumstances do you conceive that a truck would be sent out from the plant not loaded, or not fully loaded?

A. Special delivery, perhaps.

Q. I am thinking in connection with the regular routes.

A. Regular routes, I suppose that would depend on the size of the route in relation to the size of the truck being used. I would not expect Bowman to utilize a truck excepting as it would be mere optimum capacity, I mean filled to that.

Q. In other words, you have made the assumption that ordinarily they will use only that size of a truck on the route that could be filled pretty nearly to capacity?

A. Obviously you can't fill them clear to the top. It would be uneconomical to get the stuff out. There is a limit to which they will tend to load them.

Q. What are the factors, as you understand them, that determine the amount, determine the makeup of a route?

[fol. 46] A. I don't know.

Mr. Long: I object to the answer on the basis of relevancy.

By the Witness:

A. There are so many different factors. I don't know what went into the mind of Borden or labor unions in determining the route structure, the location, density of population. I don't know, it may be gerrymandered for all that matter.

Q. Let me ask you this: Did you take into account in the opinions expressed here the fact that some route areas would be much farther away from the plant than would other route areas?

A. That is not a relevant question, I am thinking. So I did not take it into account. I did not consider it.

Q. You did not take that into account because you did not regard that as relevant?

A. That would be a relevant question if you are comparing costs between routes, but not within the route as we are doing here.

Q. Did you take into account in connection with this analysis of transportation costs the time that it would [fol. 47] take to drive from the plant to a particular area and the relationship of that time in the determination of the number of stores to be served on the route?

A. For the purpose of allocation I don't think it is a question.

Q. So you did not take that into account.

I assume also that you did not take into account any possible fact that in a given neighborhood or a route area the stores average small volumes as against larger volumes in a different area?

A. That would be reflected in the method of allocation by volume.

Q. Let me ask you this: Suppose that you had an area in which the stores were widely separated within the route area and the corresponding time to be taken driving between stores, did you take that fact into account in considering the basis of allocating transportation costs?

A. Those are conditions which are reflected in your own cost study to start with and hence in that sense I guess I did. To the extent that you have considered it in your costs, reflected them in your cost structures, they are reflected in mine, excepting for the fact taking into account [fol. 48] I am allocating transportation costs on a basis of volume and distribution and insofar as those volumes of distribution among the various stores on the routes as between the different routes are already reflected in the averages by classes of stores, then they are taken into account.

Q. In your opinion, and I am testing your opinion by assuming this state of hypothetical facts, suppose that in a given area way out, far away, seven miles from the plant, that assuming that that area was occupied by only small stores

A. Yes.

Q. —and that those stores were widely scattered, one from the other

A. Yes.

Q. —And assume that it would be impossible for a truck to make deliveries to more than twenty of those small stores widely scattered and return to the plant within an eight hour day?

A. I was asked to cover half a route one day and a half a route the other day?

Q. No, let us suppose that the route was determined [fol. 49] what I am trying to say is in determining the route it was impossible to serve more than the limited number of stores because of the area

A. Yes.

Q. —distance.

A. Yes.

Q. Now, the geographical factor and the number of stops that had to be made in that case would affect, would it not, the actual transportation costs?

A. Sure, it would affect them.

Q. Yes. In other words, irrespective of any effort of the driver or any other factor, that kind of a route would be a small volume route, isn't that correct?

A. Within the limits of the availability, size of the truck might have some bearing upon the scope of the route?

Q. You would say you would send a smaller truck?

A. Or, if you could send a larger truck out there that would enhance the area he could cover.

Q. Mr. Woolley, I am trying to get your opinion on this situation. Assume that there are in that area, that twenty [fol. 50] of the widely scattered stores in that area are all that can be served within the 8-hour day, allowing for the truck to leave.

A. You are hypothesizing the size of the truck. You are starting out on the premise you have given the size of the truck.

Q. I have not given any size of a truck.

A. Sure you are.

Q. I am assuming that no matter what the size of the truck, the time taken to get from the plant to the route and to go from store to store and to deliver, and back to the

plant, that the distance of the route area from the plant as such and the distance between the stores is such that within the 8-hour day only twenty stores could be served?

A. Yes.

Q. Now in that case the cost of transportation would result not from the volume but from the location and geographical distribution of the stores, would it not?

A. Undoubtedly.

Q. Did you take that kind of a situation into account?

A. That is all reflected. That is all reflected in your [fol. 51] distribution studies. I mean, the structure of the route does there state, it is taken into account, whatever the situation is.

Q. You recognize that that structure in that case would be imposed not by the desire of management or of the union but as the result of geographic factors?

A. Yes.

Q. So to that extent you recognize that geographic factors do enter into the cost of transporting to those stores?

A. Yes, so far as the total cost of the route is concerned, yes.

Q. You also recognize that the fact that all stores within the area would have to be served, that the number of stores, were they large or small, would affect the time it would take to serve that area?

A. So would the volume delivered to each store, too.

Q. Just the very effort of getting from store to store so that it would mean the number of stores would affect the cost of transportation?

A. Sure.

Q. So that we recognize here that the transportation costs would be affected not only by the volume by also by [fol. 52] the geographic location of those stores and by the distances between the stores?

A. So far as the total cost of the route is concerned, yes.

Q. Now, on Page 34 you say the only rational basis of allocation of this cost is in proportion to the volume of fluid milk products delivered to each store. Do you adhere to that word only"?

A. In terms of allocation of a given route, yes, among the customers of a given route.

Q. Let us suppose that you had twenty stores and that

it was demonstrated that half of the time of the driver was taken in driving to and from the route and between the stores. Certainly, the cost of transportation to and from the route and between stores might also be divided rationally on the basis of the number of stores making up that route, isn't that correct?

A. I wouldn't agree with that, no, because that is overlooking the fact that this truck is used for the purpose of moving goods and the amount of time it takes is really not too relevant, as far as that particular function is concerned. These were goods occupied at given volume and space and that cost, whatever it may be, however, it may be derived, [fol. 53] or how many factors may enter into deriving that or affecting that total cost, nevertheless, that is the cost of the truck plus the driver's cost equivalent, and I can't see any real basis of allocating that warehousing element excepting on the volume that that particular kind of product, of that particular store occupies in that truck.

Q. Let us suppose that you have a truck which has certain costs that are independent of its operation, that that is depreciation.

A. There are.

Q. There are, are there not?

A. Yes.

Q. Those are included within the transportation costs?

A. Yes.

Q. Let us suppose that you have two trucks of the same size, but one of them can serve thirty stores of approximately the same volume because they lie close at hand to the original plant and are close together, and the other truck can only serve twenty stores of comparable volume because they are much further out.

[fol. 54] Now, isn't there a difference in the cost of transportation to the stores on the one route as against the cost to the stores on the other route?

A. In terms of total cost, yes. I would say to the extent the total cost of the two routes differ, the allocation to the individual stores would be different as between the two routes, but that is not the problem. The problem is allocating the total cost of the route, however, it may differ from another route to the stores on that particular route. That is the problem.

Q. Let us suppose this: That you had nineteen stores in an area that were bunched together, and that there was one store and one only in another community, and that you added that store to the route because this route can serve that store better than any other.

You would recognize that the cost of serving that store would be greater than the cost of serving the other nineteen stores, isn't that correct?

A. Yes, sure.

Q. Therefore,——

A. Simply because the distance involved might affect the cost of the store.

Q. In that case you ought to allocate the costs from a [fol. 55] different basis than volume, don't you?

A. And upon my concept, yes.

Q. In other words, a ton mile concept would be another basis of allocating?

A. Yes, incidentally.

Q. And incidentally, you did suggest that as a basis?

A. I suggested that to Professor Taggart and others and drew a blank. So for this purpose, I still, don't misunderstand, I still think the ton mile concept would be a better concept than just a straight volume.

Q. Your opinion is really not the only rational basis of allocation?

A. For the purpose of this suit, yes.

Q. And how wide is this suit—what do you mean by "for the purposes of this suit" your opinion is limited?

A. Well, because that is the way I am suggesting it be done for this particular case.

Q. Yes.

A. Simply because I do not have any statistics to do otherwise, mainly.

[fol. 56] Q. If you had other information, factual information, you would recognize that the ton mile basis would be another rational basis?

A. It might conceivably be satisfying more conditions.

Q. So really, you are not really adhering to the idea this is the only rational basis?

A. Not in the absolute sense, no.

Q. Turning a little farther down on Page 34, you had stated at Paragraph 181 in Schedule 24 of Borden's Pre-

Trial Order, demonstrate the calculation of drivers' commissions as based on the total volume.

Now, Paragraph or Section 24, or Schedule 24; just how do these two matters compel the opinion that you state there? I would like to have you explain how you draw the conclusion in Paragraph 181, Schedule 24.

A. Paragraph 181 is my citation of the fact that demonstrating the method by which Paragraph 181, the whole paragraph, which is several pages, plus Schedule 24 at the end of it, is merely put in here demonstrating the method by which your method of calculating these total commissions be calculated, demonstrating that it is reflecting the union contract formula.

[fol. 57] Q. In other words, what you are saying is that in your opinion when for the purpose of using a yardstick of determining the compensation of an employee, one of the factors is the volume served?

A. In that segment, if there is a segment of that compensation that is based upon volume, yes.

Q. Then you think that must necessarily be taxed as a cost on the volume of the customer?

A. Sure.

Q. That is all that you mean by that passage and nothing more, that is what I am trying to get at?

A. In that particular sense, yes.

Q. Now, turn over to Page 35, the bottom of Page 35. You discuss the classification of costs by independent customers as against chain store customers, and you say comparisons of costs of such chains and independents is not statistically valid since they are not expressed in comparable classifications.

Then you go on to say that as a rule of statistical principle averages as to statistical meaning in comparison must be based on comparable treatment of conditions.

[fol. 58] A. Yes.

Q. I take it that your objection to classifying chains and independents is that the method of delivering and the handling of the delivery at the two types of stores is different; and, therefore, you can't statistically compare them?

A. No, that is not what I had in mind.

Q. What do you mean?

A. What I had in mind is in your classification as you have presented your statistics, you have lumped all chain units together.

Q. Yes.

A. All chain units together and have computed your costs in the chains as a total, whereas by comparison you are allocating costs from the size classes of independents, and yet your discount structures for your independents of course is reflected in the fact of size. You make no attempt to break down the costs of the chain stores by size or unit which I believe should be the proper basis of allocating these costs to start with. That is why they are not comparable. You can't compare the average of the chain as a whole with a given size of independent, which you are [fol. 59] apparently attempting to do here, at least it is evident from the way you have analyzed your data.

Q. You understand, do you not, there were only two chain stores, companies involved.

A. Two companies but there are some two hundred and fifty different units of different sizes.

Q. All right. Now you would recognize, would you not, Mr. Woolley, that if you classified the chain stores by volume and allowed a different one as those chain stores, each class of volume of chain stores allowed on their sales, that the result would be no different in the long run than if you picked overall, a discount for all these purchases by a chain store?

A. I don't necessarily follow. It depends upon the distribution and upon your discount structure that you set up.

Q. Putting it this way: If we had only one chain store or two chain stores singly?

A. You mean a single unit?

Q. Yes. You would not quarrel in classifying the chain stores separately?

A. If you only had the one unit, obviously you would [fol. 60] compare the one unit against another unit.

Q. No, you would compare it against all of the units, could you not?

A. If you had one single store obviously that is the only basis of comparison you have, but you don't have in this

situation, you have different sizes of stores, each one of which would have a different unit cost.

Q. Suppose that I have a customer who has three stores and one store, one volume, is entitled to six per cent discount; one store is entitled to four per cent discount; and one is entitled to two per cent discount.

A. Yes.

Q. Now, if I find that a discount of three per cent equals in dollar amount, on all sales equals in dollar amount the discounts that would be given on the stores computed independently, there is no violence done to the statistics, is there?

A. Yes.

Q. Why?

A. In terms of comparing the discounts granted these different sizes because your costs are different. It is not [fol. 61] a valid comparison to compare the three per cent average with the six per cent, which is what is implied here, in order to cost justify the difference between, because you are granting one store six per cent and another store three per cent. Your costs are going to be different because of the different sizes of stores.

Q. The customer gets the same discount, doesn't he?

A. The problem is a matter of justifying the difference. You can't compare an average difference with a single difference.

Q. Oh, but you are comparing the distance, the amount to the customer, aren't you?

A. You are comparing the discount to the individual customer and the cost should be so allocated according to the individual customer.

Q. Let me take it then: Your position is that the chain stores themselves should have been divided by volume classes?

A. In terms of analyzing your costs which should have been allocated by size.

Q. Would those sizes have to be the same sizes as the independent stores?

[fol. 62] A. It would be preferable for comparable comparison, yes.

Q. Well——

A. That is as far as cost.

Q. Is that necessarily true if you have got a different method of distributing and handling through the chain stores?

A. Yes. It would be true also because what you have here, you got three factors involved. You got three factors involved, according to the Act. You got your volume consideration. You got your method, difference in methods of sales, difference in method of delivering. You've got two classes of customers.

The volume effect will be a function of the size of the store unit. That will produce a given difference in the cost for the different sizes of stores.

Now, if we didn't have these differences in method and no differences in method of sale or delivery, all you would have left would be the effects of cost due to differences in volume. So that the same size of chain store and the same size of independent store I can't conceive of how there [fol. 63] would be any difference in cost for the same size. There would be for different sizes of independents compared with different sizes of chain stores, obviously.

Q. You can't conceive of why serving a chain store where you don't make cash collections, which is on an independent basis, which does more work by the chain store than the other stores, that you can't conceive of the cost of serving them is any different than you can an independent store?

A. Sure, if you have a difference in method of sales, yes. There would be some difference arising from that difference in the cost between the chain store and the unit store, but the effect of that difference for the different sizes of stores of chain units would be different.

Q. Let me ask you this, Mr. Woolley:

I am trying to find out what your meaning is.

A. Yes.

Q. If we had not attempted to analyze cost by volume brackets of independents, but had merely taken cost of chain stores and cost of independents——

[fol. 64] A. Which in effect is what you have done, is only the statistics you have calculated.

Q. That would have been a perfectly proper statistical method?

A. I wouldn't think so.

Q. Why not?

A. Because if you had a single discount granted to all independents, yes. It might be. But you don't have it. You've got different discounts granted to different sizes of stores. You've got volume reflected in your price pattern in the independents.

Now, therefore, of necessity you are having to compare in this case 8½ per cent in the chain stores with two per cent for the independent, and 8½ per cent with the four per cent, and the 8½ per cent with the six per cent. Actually, you've got a stratofield discount structure here, each element of which must be cost justified.

Q. Yes.

A. Because you got stores, chain stores and independent stores in competition with each other of similar sizes and not too far different, that one unit of your chain store getting an 8½ per cent along with one getting a four per [fol. 65] cent, something like that. That is the comparison that you are making. Your cost would have to reflect that fact, reflect that type of analysis, size for size.

Q. Mr. Woolley, let us suppose that my arrangement with the chain stores was to give a $10,000 discount at the end of the year, a lump sum, irrespective of the number of stores.

A. Yes.

Q. Now, how would you then determine on a cost justification whether that would justify it or not? Would you have to break that and allocate it to each store and then find out store by store whether it was justified?

A. I think so.

Q. That is your idea?

A. I think you have to because your stores are in competition, each store in competition with each independent store.

Q. Are you saying that, are you giving that opinion, Mr. Woolley, because of some principle of statistics or because of some opinion you have about the meaning of the law? [fol. 66] A. A combination of both.

Q. All right, will you explain the basis of your opinion, why you hold that opinion?

A. I think I have already covered it from statistical procedures. First of all, it is a general principle of statistical treatment of data, comparisons must be under similar conditions.

Q. Just a minute, if you are making reference to the Patman Act where differences of method of delivery are one of the justified things, you are therefore necessarily comparing two things that have a different basis.

A. True, true.

Q. Nevertheless, it would be statistically proper to make those comparisons?

A. In arriving at cost upon which you are going to justify that difference, those costs must be—depends upon what the combination is. Actually, the treatment of data depends upon the nature of the price structure which is involved, obviously. Whatever that price structure is governs the treatment of the data that you are going to develop. If your price structure is such that a single overall figure [fol. 67] for one class and an overall figure for another, then the cost structures reflecting the proper analysis could be aggregated together. If you are going to have different sizes of stores reflecting different sizes of discounts——

Q. I think you have made the point that I wanted to ask you next.

If the price structure where no discount to independents and X-per cent to chain stores, then it would be perfectly right to lump all chain stores in one set of figures and all independents in another, is that correct?

A. I am not so sure about that.

Q. What is that?

A. I'm not so sure about that.

Q. I thought that was just what you said, but now why won't you agree with that? I want your reasons.

A. You have taken into account the stores that are in competition with each other, don't we? When you get into that kind of an analysis you are forcing them into size classification, even though the discounts——

Q. You mean if the stores in the Chicago area, are you [fol. 68] suggesting this is improper because we haven't taken and compared Chain store A with those independents with which it is in competition?

A. At least the comparable size class.

Q. Well now, forgetting the size class at all.

A. All right, you can do it either way you want to. You can do it both ways.

Q. I say, suppose the price structure had been four per cent to chain stores because of the different method with which we deal with them, and no discount to the independent. You could get this cost structure classified all independents in one group and all chains in another group within the principles you are saying, could you not?

A. I am not so sure. You will have to make sure that your stores would be in competition with each other. You would have to break them down into a particular area.

Q. You mean in that situation if we decide that Chain Store A was in competition with—I mean, each individual store owned by a chain was in competition with four independent merchants who are also customers, that you would have to break the cost study down to compare the costs of [fol. 69] that store with those four independents, is that your idea?

A. Either that or else handle it on a general basis when you classify them by size, it is the same thing.

Q. What would size have to do when you were not granting a discount on the basis of volume?

A. Because size affects your cost difference.

Q. In other words, what you are trying to say, it is your concept that you must so break it down that you make, in effect make a cost comparison store by store, is that correct? With the group?

A. Or comparable, similar analysis where you have reflected those conditions in your cost structure by size. In other words, if I had a chain store here in a thousand units and four or five independent stores ranging from one hundred to five hundred, you could either do it on a geographical area basis, store by store, or you could make a single study reflecting the graduated size of the stores, chain and independent alike, and compare them volume by volume.

In effect, what you are doing is taking all the stores and lumping them together and segregating them according to [fol. 70] size and then you are reflecting those cost differences that result.

Q. Do you think the law requires that?

A. I don't know about the law. That is my own idea.

Q. That is your own idea based upon a statistical principle?

A. On a statistical and economic analyses, that would be the way I would handle it. I don't know what the law says. That is for the attorneys to decide or the judge to decide that. As far as my approach to the problem as an economist and as a statistician, that is the way I would recommend it. I would even recommend it to you and your staff and as a matter of fact with all due respect to Mr. Malone.

Q. What I gather is that you believe you recognize that two stores even of the same volume have different costs?

A. They can have. They may not necessarily. They can: it depends upon the situation, if they are in competition.

Q. Is any cost study accurate in your opinion that does not take into account the differences between two stores even with the same volume?

[fol. 71] A. Would you read that question?

(The last question read as recorded above.)

By the witness:

A. Is not accurate if they do not take into account volume with respect to costs?

Q. Differences of cost even if they have to be of the same volume?

A. Well, naturally, if there are any differences which exist for the same size of stores, naturally they have to be taken into account.

Q. That really means that you cannot get a true comparison unless you study the costs of each individual unit?

A. Or comparable size classes. All you have to do is to reflect the size.

Q. But you have to make the assumption if you have got the comparable size of store that your costs are going to be the same to all that size?

A. Well, on the average, yes, for a given size class, yes.

Q. Let us take the situation of three stores of the same volume, one five miles, one ten miles, and one fifteen miles [fol. 72] from the plant?

A. All right.

Q. The costs of serving those three stores are different even on the same volume?

A. Then when you classify them by size those three

stores following the same class, what you come up with is the cost structure reflecting the average route structure, is what you are doing.

Q. But you do recognize in that case the average is comparable, is that right?

A. Under those circumstances, yes, because what we are after here is a cost structure reflecting size or volume which is an element in our problem.

Q. Now, is there anything——

A. If you don't do that you are forced into the situation——

Q. Is there anything in the Borden discount schedule that says that chain stores get it because they are big, little, or anything else, get a discount? Is there anything in the Borden price structure that suggests that chain stores should be treated on a volume basis?

A. Naturally not.

[fol. 73] Q. No. I thought that you said the price structure determined the kind of study you should make?

A. Surely.

Q. And since the Borden price structure doesn't have anything to do with the volume of the chain stores, then you don't have——

A. No, no, that is not—that is only half the horse.

Q. Well, what is the other half?

A. The other half is the nature of the discount structure given to the independents.

Q. How does that affect the discount?

A. Because you are comparing the chain stores with independents and independents get a graduated discount. The chain stores are getting a flat discount. Any chain store, regardless of the size, is getting the same discount. That means in the given area where the chain stores are competing with the independents, discrimination arises because he is getting eight per cent and these other ones are getting anywhere from two, or four to five per cent.

Q. How do you know that discount is allocated to that store, on an eight per cent basis?

[fol. 74] A. It goes without saying that any contribution of that chain store to the total, whatever that basis of the eight per cent was, I don't know, they would be chargeable

in proportion to the contribution to the total volume on which the eight per cent applies.

Q. You are just assuming that?

A. I think they would do that. I think that is a pretty reasonable assumption. If they were to allocate, in other words, if Borden had the problem of allocating the costs on a product analysis or a store analysis, they would allocate that commission expense, that commission savings to the individual stores on the basis of their volume.

Q. Let me ask you this, Mr. Woolley:

Let us suppose that Borden gave a chain store seven per cent on chain store, the volume of chain stores above a certain amount and four per cent on chain stores for a lower volume, and it happened that they averaged it out at seven per cent, six per cent of the total purchases of that chain store, that could happen, could it not?

A. It is possible, it depends on the nature of the distribu-
[fol. 75] tion and sizes.

Q. And then the chain store received a check at the end of the aggregate sum of money of the discount, isn't that correct?

A. I suppose that is what would happen in terms of actual payment.

Q. Then it would be perfectly possible for the chain store having the money on hand to then divide it up among all of those stores on the basis of volume, is that correct?

A. Possibly.

Q. And in that event even though your discount was paid to a store on the basis of four per cent of the volume of the store, it might receive six per cent credit on the books of the chain store?

A. I don't think it would be so precise as that. I think they would make a more detailed analysis of the size of the store.

Q. You are making that as an assumption, are you?

A. I don't know exactly how I would do it. I would have to get into the statistics and analyze it and come to a judgment of what ought to be done.

Q. The answer about that is, isn't it true when you come
[fol. 76] down to it that the matter in which an aggregate discount to a single customer is computed does not matter so such if on the store-by-store basis enough of a discount

was justified that would equal the same aggregate amount of the discount that is actually paid?

A. No, I wouldn't say that.

Q. The economical effect to a chain store that is able to compete would be the same, wouldn't it? It doesn't matter whether you compute ——

A. Naturally.

Q. —ten thousand dollars and say it is made up by a lot of different amounts to ten stores, or whether it is just a flat percentage to all ten stores, it is still ten thousand dollars, isn't it?

A. The aggregate, sure.

Q. Its affect upon the ability of the chain store to pay remains the same, doesn't it, Mr. Woolley?

A. Naturally the Borden or the chain store has a tremendous amount of economic power back of it. That is not the point.

Q. The ability—what I am trying to get at is the net [fol. 77] cost to the chain store.

A. Unit of.

Q. The entire company that affects the ability of that chain to complete, doesn't it, economically?

A. I suppose so, in the aggregate.

Q. Yes. So it doesn't really matter the mechanical or mathematical method that you use to compute the amount that the chain store pays, it is the amount the chain store gets that counts?

A. No, it depends upon what your purpose is.

Q. The purpose is that the chain store gets as much money as it can?

A. Sure.

Q. It doesn't matter how John Jones competes, the amount he pays, so long as the chain store gets that amount of money which obtains the same economic result?

A. The problem here is, the question is, the question of individual stores in competition with chain units in competition with individual stores.

Q. And you think——

A. The ability to compete, of course, is naturally affected by the overall company position.

[fol. 78] Q. Your basis for this study must be based on the

basis of the individual chain stores against their competitors?

A. Sure.

Q. Now, turn over to Page 38.

A. You are skipping 17.

Q. Yes. I don't understand the sentence, these three factors are the sole basis Borden uses to allocate all direct delivery costs among the classes of customers, classes of stores. What three factors?

A. Oh, driver time, number of stops, number of locations.

Q. Driver time is an aggregate figure. That is a factor for dividing it?

A. Sure it is. What you did, you took your—you made your cost study, didn't you, your time study, the drivers' activities. You add forty elements, forty different work elements. Your problem is to take the aggregate amount of drivers' salaries, wages, and in your case including commissions, and to ascertain how much of that cost is to be allocated among the forty elements, work elements. You use time study for that purpose. You aggregated the time study——

[fol. 79] Q. When you say factors are the sole basis of allocating, I am thinking ordinarily as they use the time cost study as meaning divisory. You don't mean these are the three divisors we use to allocate?

A. Yes, I mean that.

Q. The total driver time includes all of the time driving to and from routes, the amount of time spent serving stores and it includes, that is the total, total time figures?

A. That is right.

Q. That, therefore, is the total cost figure and that is not used to divide?

A. Yes, it is. I beg your pardon. Let us look over in your schedule.

Q. Well, I am lost.

A. Turn to Schedule 26. Have you got your book here?

Q. No, I have not.

Mr. Hart: What page is that?

By the Witness:

A. This is on Page 128 and this is, what do you call that exhibit? This is Borden's Pre-Trial Order number, what is it?

Mr. Long: Borden's Defensive Pre-Trial Order.

[fol. 80] By the Witness:

A. This is Schedule 26 of that defense Pre-Trial Order entitled "Borden Company, Chicago Milk Division, Allocation of Labor Costs of Routes, of Route Operations to Store Customers for July and August, 1955."

By Mr. Ball:

Q. What you mean is—may I state it this way: That where our studies show that certain time is directly chargeable to a given unit, that the time there is used as the divisor?

A. Not quite. It is that, too.

Let us start at the bottom here. You have given $29,242.50 were the total labor costs, right? From the time study you came up with an allocation in time on these forty different work elements shown here as they distribute themselves among those chain stores as compared to the independents and other stores and later on by the size of the store.

That aggregates to a certain amount of minutes for Item No. 1 down through Item No. 40. In allocating the twenty-[fol. 81] nine thousand dollars, all you did was to divide the twenty-nine thousand by the total number of minutes served, or spent, and that gets you a certain cost per minute and apply to these number of minutes distribution, and that gives the total cost, and all your problem is, is to allocate this total cost per minute among the stores according to the bases and the time, location and stop.

Q. I see what you mean now by what you have said.

Now turn over on Page 39.

A. Yes.

Q. Looking at your Paragraph 21.

A. Yes.

Q. And I call your attention to the second sentence:

"Not all of the independents themselves receive all of these differential services on the sample day of their time study in 1955."

Will you please describe the basis you have for that statement?

A. Well, the record in your case is not clear on the matter and I would like to have it clarified in my own mind, because in Bowman's cost study I find that to be a fact and I presume the two companies operating the same in [fol. 82] dustry and under similar circumstances have a similar reaction.

In other words, if I had asked you to go into a detailed analysis of this, of these services as they accepted them on the various sample days, I would come up with a picture similar to what I found in Bowman on these points.

Q. You did have available——

A. I want a clarification of the record on that.

Q. You did have available and turned over to you as bulk exhibits the time——

A. I don't have the bulk exhibits.

Mr. Ball: The bulk exhibits were turned over to you or made available to you.

The Witness: Made available. I did not call for them.

By Mr. Ball:

Q. And the bulk exhibits indicated, that is the time spent on the various items to all classes of stores. What I am getting at, you did not make this statement on the basis of any information contained in those bulk exhibits?

[fol. 83] A. I presume if I had asked for it to be done like I had asked for the volume distribution of these store classifications, if I had the same thing done with each of these elements, I would probably come up with the same picture that Bowman did. Maybe we should do that. I don't know.

Q. But as the record stands now this sentence is not based upon any information presently in your possession so far as Borden is concerned?

A. No, but to me this was a simple way of getting the answer that I would come up with, anyway. True, I would like to have a clarification of the record in the matter.

Q. It is made here as a statement of fact, Mr. Woolley.

A. I know, because presumably this is a trial order. If you and I and counsel and everybody else agree to it, it will become a fact of record.

Q. At the present time you don't?

A. At the present time it is up in the air. That is why I would like to clarify it.

Mr. Ball: That is all the questions I presently have. I trust that you will permit the deposition to stay open, though?

[fol. 84] Mr. Jinkinson: Yes.

Mr. Ball: Until such time as Bowman has taken the deposition and with the same idea if there is anything relative that should be included that will not delay our work going ahead and trying to formulate a rebuttal pre-trial order?

Mr. Jinkinson: I have no objection. That is agreeable.

Mr. Ball: That is all, then.

Mr. Long: Just a few.

Mr. Stevens: We will reserve ours until the material is ready for us.

Redirect examination.

By Mr. Long:

Q. Mr. Woolley, in your opinion, as our expert here, does the ownership of the store have any effect on cost?

A. Offhand I don't see any relationship between the fact that one store is owned by an independent businessman or entrepreneur, otherwise known as a corporation or even a partnership, for that matter, as far as this particular [fol. 85] problem is concerned.

Q. What would you say about a classification?

A. A classification on the basis of ownership to me is totally irrelevant. The classification would be on the basis of cost structure. It is the cost structure that is involved. You have a different type of discount structure. Well, that is the basis upon which the analysis should be based.

Q. On Page 34 Mr. Ball asked you about the only rational basis of allocation is on the basis of volume, upon what basis, for what reason do you think this is the only rational basis of volume concept?

A. You have here a truck whose purpose, which should be the basis of allocation of cost, is to provide a movement of a quantity of goods from one point to another. That is the sole purpose. The driver's time involved in that is also a relevant cost of the operation of that function.

Now, that commodity, those commodities occupy a certain amount of space in that truck, obviously, and as the expert witnesses had testified heretofore, which I agreed to, it can be compared with, as Mr. Taylor so well stated [fol. 86] it, to a warehouse, mobile warehouse and it is a standard procedure of allocating warehousing costs to reflect the space occupied in allocating the cost of the warehouse to a given set of commodities occupying a given space.

Similarly, truck costs can be handled in that way. That is in a sense which I say only a rational basis.

The warehouse providing motion, the costs can be allocated to the various products within that truck on the basis of the space it occupies or volume which is similar to it. I mean, they are both directly related and since the customers' contribute to that total volume delivered they share in that demand for that service, incidentally.

These customers could obviously come to the warehouse, come to the distribution plant to pick up their own milk if they wanted to, if they felt the need for it: if they felt they wanted to pay for some costs, they could do it for the cost analysis on their own part is cost delivered to them, if Borden would let them, of course.

So these customers require, and it is because of their requirement, that this type of service comes into being. So [fol. 87] they are responsible to that extent for the cost of transportation. And the thing that is most closely related to that demand is the volume they are receiving, naturally. That volume is tied in with the space that is occupied in the truck. So it is on that basis that I feel that the allocation of this cost of the transportation including the driver's portion, his salary allocated to that function, should be

allocated to each of the stores because they contribute to that demand for that type of service.

Q. You feel it is a vast and most profitable thing?

A. Yes, and incidentally there is another thing, reviewing the method of transportation here, in reality you don't have any difference in method of delivery between customers. The mode of transportation is identically the same. It is by truck. The place of delivery is identically the same in terms of principle to the door of the customer. The time of delivery is the same in terms of daily versus monthly or annually or quarterly or whatever you might say. The ownership of the truck is identically the same.

[fol. 88] Those, to my way of thinking, are the principal sources by which a method of delivery might be distinguished between customers. The ownership might be by the supplier or it might be by the buyer. In so doing there would be a difference in cost arising from that difference. The place of delivery might be different. You might have a truck delivered direct to the door in this case of each customer, or you might have some of those customers receiving, like in the case of the chain they might want it delivered to their own warehouse or some other central point from which they would then take up their own orders for the distribution of their own individual units. In that case there would be a difference in the method of delivery and a difference in cost arising therefrom.

You might have another source of difference arising from differences in frequency of delivery which would be either daily basis or monthly or quarterly or annually, in which case there would be a difference in cost arising therefrom.

So you have all of this and of course you might have differences in type of transportation involved, you might [fol. 89] have a truck on the one hand, an airplane, water, train, etc. on the other."

These are general principles of course, rail, water; and different customers might conceivably be receiving their commodities in these different methods, manners or methods of delivery. So you have about four or five different types of ways in which the method of delivery might differ, hence, it gives a variety, and in this particular case you have no differences in any of those patterns.

Q. Do you recall, Mr. Woolley, whether you discussed this particular matter with Mr. Lundbahl of the Federal Trade Commission?

A. What do you mean? Just what I have been talking about or this question of the allocation of volume?

Q. Yes, sir.

A. On the allocation of volume, yes.

Q. Do you recall what his attitude was?

Mr. Ball: I think that would be hearsay evidence.

Mr. Long: Oh!

By the Witness:

A. I was talking to him.

[fol. 90] Mr. Ball: It would be objectionable. I can't prevent you from asking the question here, but I think it is disputable.

Mr. Long: Counsel has already gone into what you told Mr. Lundbahl here.

By Mr. Long:

Q. What did you tell him? Did you talk with Mr. Lundbahl?

A. I talked with Mr. Lundbahl about——

Q. Let us have Mr. Lundbahl's attitude?

A. I talked on this particular point of volume.

Q. Yes.

A. Of course, I went to him with the idea of seeing whether they would agree with my concept of a ton mile system of allocation of these costs and they didn't quite see the point that I was trying to make, or at least they didn't agree with me on the ton mile concept. They did agree with me on the fact that the volume would be the proper basis, or conceivably could be a proper basis.

Q. Mr. Woolley, when Mr. Ball was asking you about Article 42 of the union contract——

Mr. Ball: 42-A.

[fol. 91] By Mr. Long:

Q. He asked about 42-A. Is 42-A what you relied on?

A. I guess I was—no. Oh, I was thinking when I said 42-A, I was thinking of 42 applied to that whole paragraph. No. It was 42-E.

Q. You meant 42-E?

A. I meant 42-E on commission wholesale and that is the thing that is involved here, just for the sake of the record.

Q. Let me ask you another question about the ownership of the store.

If two stores take the same quantity on the same route, can ownership make a difference?

A. No. No, I don't see any difference on costs. It is the function of volume, the functioning of other factors which give rise to the accretion of costs.

Mr. Long: That is all I have.

Recross-examination.

By Mr. Ball:

Q. Mr. Woolley, I own, or assume for the moment that John Jones owns two stores. Isn't it the truth that he can [fol. 92] for purposes of keeping the smaller of the two stores going and competitively allocate his costs in such a way that some of the profit from the larger store is used to keep the smaller store going?

A. Oh, sure.

Q. So economically the fact that there is a common ownership can well mean stronger competitive effect of the smaller store, is that true?

A. Naturally the larger the multiplicity of stores the stronger the economic operation power there, derived therefrom. Naturally every unit benefits from it.

Q. So there is an economic difference between an independent store and a chain store, isn't there?

A. Only because of the size and not because of ownership. Not because of corporate ownership versus independent ownership. I mean, an independent businessman might develop conceivably a series of chain stores and still keep himself as an entrepreneur or partnership, if he

has financial backing himself, as against the corporate form. I think that is the direction of the question.

Q. I am not talking about the corporate form. There is [fol. 93] an economic difference between the store unitarily and the store which is one of a group which is singly owned?

A. In the terms of the number of plants owned, yes. You don't have a different ecor omic effect.

Q. Different economic effect?

A. Effect of cost but not in terms of form of ownership.

Q. I want to ask you this one situation here, one more hypothetical question.

Suppose that I have a truck. I am going to deliver on a route going out of the town that has my warehouse. A day's route. I am covering the little communities that are on the average twenty miles apart. All I can do in a day is to cover ten of those communities.

A. Yes.

Q. Nine of the ten have stores or customers that take comparable volume, and one store takes three times as much as the other. Isn't it a fact, however, that it costs me just as much to deliver the small store as it does the large store?

Mr. Long: I object.

[fol. 94] Mr. Ball: I am asking that as a hypothetical question.

Mr. Long: I am objecting on the basis this is irrelevant, incompetent and immaterial. It has nothing to do with this.

Mr. Ball: It is merely to test the opinion of the witness or basis of his opinion.

By the Witness:

A. The total cost of operating the truck is a route cost. The question of allocating that cost to the store is a different question.

By Mr. Ball:

Q. As a matter of economic fact, however, isn't it costing me just as much to serve the small store as it is to serve the large store?

A. No, because their contribution to the use of that truck is different, because the use of that truck is a function of the volume they receive.

Q. Now, let us add one more factor to the hypothesis and see how far you go down this line.

Suppose that a big customer drops out and I replace him with a customer no larger than the others but I can't. [fol. 95] I still have to make the twenty miles to that location.

Mr. Long: The same objection.

By Mr. Ball:

Q. The cost of serving the new customer is just as great as serving the old customer, isn't it?

Mr. Long: Note the same objection.

By the Witness:

A. His contribution to the use of that truck is different.

By Mr. Ball:

Q. So you are looking at no other factor in that answer but the use of the truck, is that right?

A. Sure, that is the basis. That is the purpose of the truck to start with.

Q. Your answers on this matter of allocating transportation costs are based upon the fact that you rigidly adhere to the concept that it is the use of the truck by volume that determines the total cost of allocating the truck?

A. Yes.

Mr. Ball: That is all.

[fol. 96] Redirect examination.

By Mr. Long:

Q. Mr. Woolley, your following is not a matter of rigidity, it is a matter of intelligence?

A. I hope so.

And Further Deponent Saith Not.

[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BORDEN COMPANY, et al., Defendants

Deposition of Elliott B. Woolley—Filed February 13, 1959

The deposition of Elliott B. Woolley, called by defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.; pursuant to agreement of the parties and pursuant to the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions for the purpose of discovery, before Joseph R. Betz, a notary public within and for the County of Cook and State of Illinois, on September 11, 1958, commencing at 10:30 o'clock, a.m., in Room 219, United States Courthouse, Chicago, Illinois.

PRESENT:

Mr. Earl Jinkinson, and Mr. Bertram Long, on behalf of the Government;

Mr. John P. Stevens, and Mr. Robert Havemeyer, on behalf of defendants Bowman Dairy Company and Ridgeview Farms Dairy, Inc.;

[fol. 2] Mr. Stuart S. Ball, on behalf of defendants The Borden Company and Belmont Dairy Company.

[fol. 3] ELLIOTT B. WOOLLEY, having been first duly sworn, deposeth and saith as follows:

Direct examination.

By Mr. Stevens:

Q. Would you state your name, please?

A. Elliott B. Woolley.

Q. And, Mr. Woolley, you testified in the deposition in this case that Mr. Ball took a few months ago, didn't you?

A. Yes.

Q. And if I asked you the same questions that he asked you at that time, I take it you would give the same answers?

A. Yes, with the exception of the fact that I would like to amplify a couple of statements, if I might, at this time.

Q. Could you tell me on what subjects you would want to amplify?

A. With respect to Mr. Ball's question relating to my being in harmony with the preceding experts' testimony, I think I just gave a categorical answer that I was in general agreement with them, but there is one point I would like to point out.

[fol. 4] That is in his interrogation of them on the matter of alternative uses of methods of allocation where you have possible alternatives, I think their general answer was that either was more or less likely and equally acceptable. I may not be quoting their answers exactly right, but the impression I got from them was that there was a basic assumption, of course, involved in those answers, and that is that such alternative methods, if they exist, will be equally acceptable only if the result from the application of those respective methods are consistent with each other with respect to the conclusions to be drawn from the facts developed.

For example, if you have two alternative methods of allocating certain elements or cost and they give such a wide disparity of results, conclusions to be drawn from those are going to be radically different and perhaps even the opposite direction; then I would say it is not equally rightfully acceptable to use either one of the methods.

Under that condition, as I say, I have reservations with respect to their answers.

Q. Is it your opinion, Mr. Woolley, that alternative [fol. 5] methods may be acceptable only if the alternative methods produce substantially the same results?

A. Wherein the net conclusions are not changed or altered.

Q. By net conclusions you mean if one method shows cost justification and the other does not show cost justification?

A. No; then they are not equally likely acceptable methods.

Q. In other words, to take a concrete example, assume by one approach a differential of five per cent can be justified and by another approach a differential of six per cent can be justified.

Now, if the actual discount were only four per cent, you might find them both acceptable, assuming one per cent is significant?

A. Well, if you are trying to justify four per cent to start with, and they both come up with something greater than four, then it is immaterial. But if one comes up with something greater or equal to the discount that you are trying to justify, and the other comes up with something substantially less than you are trying to justify, obviously [fol. 6] there is something wrong because the result should be consistent if both methods are equally acceptable, or if we are likely to produce two. That is what we are after, a true accounting of what the real costs are. That is what we are after.

Q. Well ——

A. (Continuing) And the real costs under any method of allocation cannot be inconsistent with themselves, otherwise there may be something wrong with one or the other method, or they may be both wrong.

Q. Well, let me go back then to the assumption. Assume the two methods are being experimented with and by one method a differential of five per cent is determined, and by the other method a differential of six per cent is determined.

Would it be possible for both methods to be equally acceptable?

A. Depending upon what your price is. It is relative to what your price is, of course, and what the result is that you want.

Q. Well, my first question ——

A. It is all relevant. I should not say what you are after. The price structure that you're dealing with or what the [fol. 7] differential is you are talking about, you cannot talk about it in a vacuum, of course. It depends upon what your purpose is.

Q. My first question is, just as a matter of accounting analysis, would it ever been possible for both methods to be equally acceptable if one produced five per cent and the other six per cent?

A. Depending on your purpose, yes. You cannot divorce it from purpose. No statistical treatment of any case can be divorced from purpose. That applies to accounting as well as to general statistics.

Q. Well ——

A. You have to keep in mind that is true of sampling as well as anything else. You can have several different methods of sampling. In one circumstance for one purpose one method might be applicable, and in another circumstance or for another purpose the other method might be applicable. In a third purpose both might be equally applicable.

Q. Well, just ——

A. So you have to define your purpose before you can answer the question.

Q. Just to be sure I understand you, there are some [fol. 8] situations, at least under your modified answers to the questions at the last deposition, wherein it might be acceptable under accounting principles to use one approach which produced a justification of five per cent and to use another approach which produced a justification of, say, six per cent.

A. Yes.

Q. I say there might be some situations.

A. There might be some situations.

Q. But I take it you are saying that situation in your opinion would not and could not be present if, for example, the price you are trying to justify was a five and a half

per cent price, so that the five per cent answer would not justify it but the six per cent answer would?

A. Well, of course, then you get into the question of diminimus and what constitutes the significant difference.

Q. Well, let's assume the difference is significant.

A. Well, if it is significant, whatever the measure of significance might be, then I would say yes, the five per cent method is not applicable to that situation.

[fol. 9] Q. So that the question——

A. Either one or the other may not be. It may be that both may be at fault or have some deficiencies in them to produce the discrepant result.

Q. So the acceptability of the two possible alternatives would, in your opinion, be dependent upon whether one was below and the other above the price which was attempted to be justified?

A. Not that alone, no. It would depend upon the reasonableness and degree of care with which the respective methods have been applied and the principles upon which they depend.

Q. Well, let's assume that both approaches are done with equal degree of care, equally thorough, but the difference results entirely from the judgment exercised by the expert in selecting a different service unit or different principle of allocation, and that one principle would produce one figure and the other would produce the other figure, and by terms of abstract reasoning you could not support one any more than the other.

Might there not be some situations in which you would have to say, at least in the abstract, that one approach was equally acceptable as the other?

A. Well, I suppose so, yes——

[fol. 10] Q. What I am asking is, if you had all those conditions present, would you still say that if one answer was above the price differential and the other answer was below the price differential?

A. If that result came forth from those conditions, I would suspect that something was wrong with the fundamental conditions. I would expect two alternative methods would not be significantly different from one another if the principles themselves upon which they are founded are consistent with each other.

If the two principles upon which they are founded, if they are not consistent with each other, then, naturally, you are going to get different results and you are going to have to make up your mind which you are going to take, because truth can't be inconsistent with itself.

Q. Well ——

A. The two principles pre-suppose certain premises, and if those premises are inconsistent with each other the results are going to be inconsistent with each other. You are going to have to make up your mind which one you are going to take. It can't be inconsistent. You cannot be inconsistent with yourself. At least I would not want to be. [fol. 11] In that situation I would have to make up my mind which one I wanted to accept as representing my judgment as to the best of my ability of the facts of the matter.

Q. Well, what do you mean when you say that the two alternative approaches should be consistent with one another? Isn't the very fact that there are alternative approaches a suggestion that there are inconsistent ways of going about attempting to answer the same question?

A. Well, you are getting into matters of degree, I suppose.

Q. Do you mean they must produce the same answer in order to be consistent?

A. I would expect them to produce something similar and not have significant differences. That is my point. If they have significant differences where conclusions are altered thereby, then I suspect there is something wrong in either one or both.

Q. Well, does it matter—Would you automatically say that the one which is wrong is the one which tended to justify?

[fol. 12] A. Not necessarily, no. That depends upon the whole scheme, the schematic by which the results are obtained.

Q. So that if you had ——

A. Comparing one with the other, you have to make up your mind which one you want to accept. That is all.

Q. If you have two answers, one of which will justify a differential and the other one of which will not justify a differential, your judgment as an accountant as to which

was the more acceptable would not be influenced by the fact that—by which was below but, rather, by your judgment as to which employed the more appropriate approach?

A. A more reasonable approach in relation to your purpose, yes.

Q. Now, other than that, would you still make the same answers to the questions which Mr. Ball asked you before, if I were to go through the same subject again?

A. I think more or less. All I can recollect. Now, there is one other matter in connection with my deposition of two months ago. I have forgotten the page number on which it occurred, but there is a discussion or there is a line of interrogation, rather, in which I was asked some-
[fol. 13] thing about transportation costs and the reasons for the use of volume statistics.

I would just like to add a sentence or two. I don't know where it will fit in there, but Mr. Ball's abstract of my deposition will show me. Do you have it there?

Mr. Ball: Yes, I was going to turn to it.

The Witness: Let me have it and I will show you. I will read the paragraph which I would like to have an amendment added to. Here, this is Mr. Ball's preliminary draft of my cross examination.

Mr. Ball: Off record.

(Discussion had off the record.)

By the Witness:

A. (Continuing) Now, I would like to expand.

By Mr. Stevens:

Q. There is some general subject you wanted to modify or expand your answer on?

A. Expand, yes. With regard to transportation costs, in the former deposition or the preceding deposition it deals with a discussion of my reasons for using volume as a basis for allocation of transportation costs.
[fol. 14] I did not quite finish the thought I had in mind. Now, this is to be added to what I said. I am going to quote now. Put this in.

"The volume concept for purposes of this suit under the Robinson-Patman Act is consistent with, in result, the lack of difference in method of delivery that do not exist between the classes of customers involved."

Now, maybe I have not got that clear.

Mr. Ball: May I ask a clarifying question?
Mr. Stevens: Yes.
Mr. Ball: I don't want to interrupt here.
Mr. Stevens: O.K. Go ahead.

By Mr. Ball:

Q. Do you mean, as you read the provisions of the Robinson-Patman Act, that you interpret the phrase "differences in method of delivery" as not including the subject matter that has been used in the Borden cost study?
A. Not all of it. Some of it. Not all of it.

By Mr. Stevens:

Q. Well, let me ask you this.
[fol. 15] A. Well, let me rephrase my thought now. To the extent that differences in methods of delivery do not exist between classes of customers, therefore, there cannot be any cost differences resulting therefrom. Therefore, a volume basis of allocation of transportation costs, which necessarily are related to delivery, and methods of delivery thereof, should not or will not produce any cost differences between the classes of customers just by the nature of the arithmetic involved.

So the use of a volume concept to me is consistent with the conditions which I find in the Bowman and Borden cost studies, as far as I am aware of them, and that is that there are no differences in method of delivery and, therefore, there cannot be any originating cost differences from transportation costs.

If you are going to include transportation costs at all, they should be allocated on a volume basis, since that is consistent with the underlying premise of the conditions that exist, namely, no cost differences.

Q. Does that complete your answer?

[fol. 16] A. I think that is more or less the way I would like to amend that particular section where it fits in.

Q. Well, now, in your opinion, Mr. Woolley, are there any differences in the method of delivery of fluid milk as practiced by the Bowman Dairy Company between deliveries to independent stores and deliveries to chain stores?

A. I see none.

Q. You see none?

A. I see none.

Q. So it would be your opinion that there would be no basis whatsoever for justifying any differential in price as between independents and chains?

A. On the basis of costs originating from differences in methods of delivery, of course, there are other sources of costs which are relevant to the Act which may be there. The method of sale might be different.

Q. Are there any relevant differences in cost between Bowman's dealings of all kinds with independents and its dealings of all kinds with chains——

A. That is too broad a question.

Q. (Continuing)—which you would recognize?

A. As I understand the terms of the Act, you have the [fol. 17] costs that are relevant, according to my concept, those originating from differences resulting from differences in volume, which are more or less always present, the differences in method of sale and the differences in method of delivery.

Q. Now, you would agree, would you not, that at least as between a large chain store and a small independent, there might be cost differences resulting from differences in volume sold?

A. Surely.

Q. Incidentally, I take it you did not criticize the Bowman study for failing to take into account the varying sizes of the different chain stores?

A. No, because you reflected those different sizes in your cost structure, or your cost analysis, I should say.

Q. And the Bowman analysis did take into account the size of each individual chain store which was studied and each individual independent store that was studied?

A. I think so.

Q. So your objections, and I recognize you have objections, do not go to the classification of the customers?
[fol. 18] A. Oh, yes, but for another reason. For a different reason. I don't agree that for purposes of price making the question of the fact that one is a chain and the other is an independent has any meaning for the purpose of pricing.

Q. But for the purpose of justification?

A. For purposes of justification, either.

Q. The differences, such as may exist, have been taken into account in the study?

A. As far as they reflect differences in volume and the relevant differences in method of sale and delivery, if any.

Q. But what you are saying is that all the chain stores are charged the same price, even though there are variations in costs as between individual chain stores; that is what you are commenting on now?

A. You lost me.

Q. I thought you were comparing chains as against independents.

Mr. Stevens: Read the question, please.

(Question read by the reporter.)

By the Witness:

A. I was thinking about the cost comparison between [fol. 19] chains and independents.

By Mr. Stevens:

Q. Maybe you better explain again what your objection is to the method of classification employed in the Bowman study.

A. The method of classification arises out of the fact, as far as I see your cost theory—it arises out of your approach to allocating these costs to these classes of customers; but in so doing, there have been introduced here inherent discrepancies—well, that is not the word I want to use, but discrimination between the two classes of customers simply because you are claiming that a certain class of services are applicable to independents and not appli-

cable to chain stores, and your cost differences are derived accordingly.

Q. Well, Mr. Woolley——

A. Let me finish. Now, that might be all right if all the independents did receive all those services you claim as a source of difference between the two classes of customers, chains versus independents, but in analyzing the facts of your customers from the data supplied, I find that that is not the truth.

[fol. 20] The fact is that you have independents who stand in the same category as your chains with respect to your theory of justification, or your source of justification.

Q. Stand in the same category as chains?

A. As chains, yes. You have some independents who do not take the so-called services upon which you rely for your cost differences, yet you are claiming on the one hand that we can justify the differential between chain stores and independents through this method or this theory; yet, on the other hand, even if you were successful there you still would have an inconsistency there because you still have a group of independents who do not take that customer service, and yet stand on the same basis as chain stores, and yet they are getting the same discount as independents.

So your whole system is inconsistent.

Q. Mr. Woolley, isn't what you really mean to say——

A. Inconsistent with the facts of the case.

Q. Isn't what you really mean to say, is that on the days in which the time studies were made, there were some independents who received no customer services on those particular days? Isn't that the fact from which you have [fol. 21] drawn this?

A. As far as I know, they may never take it. We don't know.

Q. But isn't it also true, Mr. Woolley, that you found on your review of the data that there were independent customers who did not receive optional services on some days and did receive optional services on other days?

A. That is right.

Q. And what you are saying is you don't know whether all of the independent customers received some optional services on some days?

A. Nobody knows that unless they make a complete study of it.

Q. And you did not find in your review of the material, I take it, Mr. Woolley, that there was any indication that the optional services were not made available to all independent customers, or did you?

A. That is one of the troubles with this case, with this case as I see it, that those stores were not told that they would get a differential discount if they did not take these optional services. They were not advised that there is a cost difference involved to Bowman if they did not receive [fol. 22] these customer services and, therefore, a beneficial discount would be given to them if they did not receive them.

Now, my point is——

Q. Well, you say——

A. Let me finish my point. My point is that under those conditions, under those facts of your customers, it seems to me that the question of chain stores versus independents is irrelevant to the question of discount policy. But if you are going to devise a system here wherein you are going to reflect in it, in your cost structure, which should reflect your discount structure, conditions which are applicable to one group of stores and not applicable to another, then those conditions must be consistent with both groups of stores.

So, therefore, your basis of discount policy under these conditions that you find in your industry, if we are going to set up a discount, if we are going to justify this thing on the basis of services, then we must find out who those customers are who consistently take it and who those customers are that don't consistently take it, and who those are that don't take it at all.

Then we should adjust our discount to reflect those cost [fol. 23] differences resulting, if that is a proper source of cost difference, not the basis of chains versus independents as a group of customers. That is what I am getting at.

Q. Just summarizing, your point is that the data does not show in your opinion that all independents take the optional services?

A. That is right, which introduces an inconsistency into the theory of justification.

Q. Now, assume that they did all take the optional services or we were only talking about customers who did take

optional services, independent customers who did take optional services, just so that I can understand your views.

A. Which, incidentally, is only half of your total number of customers.

Q. Well, more specifically, Mr. Woolley, if you are going to comment, it is only half of the customers that took them on the particular days that there were time studies.

Now, you do not mean to say that in your opinion only half of the customers ever took customer service? You don't mean to indicate that?

[fol. 24] A. The sample of the sample stores, and they are presumably a representative sample according to Bowman's claims of your independent stores' structures, and on your samples and from your samples you found that roughly half of those stores took the customers' services.

Q. Bowman did not so find, Mr. Woolley. Can you point to anything in the Bowman study that so finds?

A. From your basic data I obtained that information, yes.

Q. You drew that conclusion from the basic data.

A. From the basic data which I took, which you could have done the same yourself.

Q. All right, but the data which you examined then was data which showed specific time studies of specific customers, and you found that on the days in which the time studies were made, there were, whatever number you say, that did not take customer service on those days.

I am asking you if you drew from that the inference that those customers never took customer service?

A. It is a possibility some of them never do, yes.

Q. Well, did you draw that inference?

A. That is an inference I think I can rationally draw [fol. 25] from that sample. Remember, that is a sample. Now, if you were to repeat that sample you probably would get different results.

Q. Well, is it your view, Mr. Woolley——

A. That is the purpose of a sample, to give you a generalization from a partial counting of your total population, and if you cannot draw an inference from a sample, assuming it is representative, then there is no purpose in using a sample and no purpose in your cost study.

Mr. Stevens: Off the record.

(Discussion had off the record.)

By Mr. Stevens:

Q. Is it your conclusion from the data, Mr. Woolley, that one-half of the Bowman customers studied never take customer service?

A. Well, wait a minute. I think it is the other way around, half of the customers. I think the figures I had in there showed roughly half of the customers took the services on the sample basis, and I think another forty per cent, or something like that, were the ones that did not take it at all, and ten per cent or twenty per cent of them took it on part of the days, on half the days that were sampled. [fol. 26] Q. Well, is it your opinion, based on this data, that the remainder never take customer service?

A. I think that is a fair conclusion from that sample, lacking any other evidence.

Q. How many days were covered by the sample?

A. Well, I don't recall offhand, but it was spread through the year, I can remember.

Q. Do you know how many times a given customer was studied at the most in the study?

A. Twice, I think, on this particular one.

Q. Were any customers studied more than twice?

A. I don't think so.

Q. Now, are you drawing the conclusion that if a customer were studied twice and did not take customer service on either of the two days on which he was studied, that it is fair to infer that he never took customer service?

A. No, I am not saying that at all. No, I did not say that at all. There were some studied in which there was no customer service rendered at any store on either of the days. Let's go back to the study. In the first place, as I recall, some of the routes were sampled once, so that [fol. 27] means each store was sampled once with respect to its customer service.

Now, on those routes that were sampled once, some of them took it and some of them didn't.

Now, as a sample, a preliminary judgment would be that, all right, some of these customers would not take it at all.

Some of them might take it the next time you sample. Some would not take it at any time. I do not know what the proportion would be.

Now, on the other set of routes we sampled twice. We repeated the sample. Now, those routes that were replicated I found some customers that were served on both days. Others were served the customer service on one sample but were not served on the other. The third class were not served on either of them.

Now, from that as a sample, it is fair to assume that there are customers who probably will not take any customer service at all during the year. There are others who will take it some of the time, but not all of the time. And there are others who will take it all the time. There will be some varying degrees between.

[fol. 28] You would have to make a more adequate representative sample, incidentally, of your whole customer list before you could come to that conclusion. On the basis of this partial data we have before us, there is some reason to doubt that all of your customers take it all the time or even part of the time.

Q. Now, if they all took it all the time, in your opinion would that be a method of delivery which could properly be considered as a basis for analyzing cost differences?

A. No, because I don't consider those services relevant to the Act flowing from a method of delivery.

Q. You would not consider that a different method of delivery in any event? So your basic position is——

A. No, all I am saying is if—I am premising this in the preceding argument on a condition that if it is a proper source of cost difference, then under these conditions your application leads to an inconsistent discount structure.

Q. Well, you would consider for one group of customers the merchandise is actually put in the display cases, and for another group of customers the merchandise is not actually put in the display cases by the driver, that that [fol. 29] is not a difference in method of delivery which should be considered?

A. No. I consider the delivery stops when he delivers the milk to the store. What he does after that is purely optional, purely something where he wants to give personal

service. It is just a service rather than method of delivery.

Q. I am just trying to get your view.

A. I think my definition of method of delivery is more completely defined in the preceding deposition Mr. Ball took. I think I went through it. I am not sure. I think I covered it. If it isn't there, it will be in our argument.

Mr. Stevens: Off record.

(Discussion had off the record.)

By Mr. Stevens:

Q. All right. Then you submitted—rather, the Government has submitted a volume of exhibits in its proposed rebuttal to the Bowman Dairy Company phase of the case. I take it you prepared or were in charge of the preparation of most or all of those exhibits?

A. Yes, sir.

Q. Now, in the portion in which you make certain cost [fol. 30] analyses of the Bowman delivery picture, you do give effect to the cost difference resulting from this particular difference that we have been talking about?

A. Yes, that is right.

Q. But I take it in your view that would not be a correct way to go about it?

A. No.

Q. All right.

A. May I explain the reason for it?

Q. I was going to ask you: What were you doing in all these exhibits?

A. All right, I am merely trying to show to the Court, assuming he is going to read it, or look it over, that you have got two propositions to solve. First of all, he has got to determine whether or not these services are relevant to the Act, and, if they are,—rather, if they are not relevant to the Act, and, of course, any cost differences arising from them are to be eliminated entirely, then you can easily see what the affects upon the cost differences is.

But if he comes to the conclusion that they are relevant, then I have certain technical criticisms of the method by which these customer services were determined in terms of [fol. 31] translation into time and cost.

So, for that reason I incorporate them in this data here to show my technical criticism of the methodology by which those time elements were developed from your formula.

Q. Now, Mr. Woolley——

A. They are not there because I agree that they are part of the method of delivery.

Q. So that——

A. That also applies to the data relating to fibre versus glass proportion as it affects your development of the number of cases and the number of glass containers delivered to stores, and so forth. Maybe I am getting a little ahead of you.

Q. The portion of your study which is based on—I think it is Charts IV-A and IV-B, and everything that is developed from those, you would say in your opinion is not correct, but you include it on the assumption that if the Court considers this factor correct, why, then, these are the answers he should get from this particular portion of the case?

A. Yes. Pardon me one moment. It is not Table IV, I don't think. It is Table——

[fol. 32] Q. I meant Chart IV, excuse me. Where I said Table 4 I meant Chart IV.

A. One? You mean customer service?

Q. No, I referred to glass-fiber.

A. Oh, excuse me. Well, that is Charts III and IV.

Q. Well, III is the one on containers.

A. Yes.

Q. And IV is the one on glass and fiber.

A. Yes.

Q. Well, now, would your same comment apply to your——

A. No. III is on chain stores. It covers both class of customers.

Q. The relationship between the number of containers and the number of points is what you try to express in Chart No. III?

A. That is right.

Q. But again you would say that in your opinion is really not significant—or, I mean, should not be taken into consideration; but if it is to be taken into consideration, it

should be taken into consideration in the way in which you analyzed it in your material?

A. Yes.

Q. Did you have assistance in the preparation of all [folio 33] these exhibits?

A. Initially, no.

Q. Well——

A. I did it all myself.

Q. Well, ultimately did you have personnel who worked for and with you in the development of this material?

A. No, only for the purpose of checking material after you found substantial errors in them.

Q. Well, I might do it this way: Originally, is it not correct, that you submitted a group of exhibits to us?

A. Yes.

Q. And then when they were reviewed, there were some changes to which both sides felt needed to be made, and then you revised your material and submitted a revised group of exhibits?

A. That is right.

Q. All right. First with respect to the original group of exhibits, did you prepare all of those exhibits yourself?

A. Yes.

Q. Did you do all of the calculating and the assembling of underlying data and review of material that was neces- [fol. 34] sary to precede the preparation of those exhibits?

A. With one exception. Yes, with one exception.

Q. What was that exception?

A. With respect to the fiber-glass where we obtained a one-third sample of routes from your company. The initial tabulation or the conception of the analysis originates from myself. The mechanics of tabulating the number of points delivered, the number of containers delivered by stores from each of these routes, chains versus independents, that initial calculation or tabulation was performed by the FBI for us.

Q. How many men did they have working on that?

A. Oh, gee,——

Mr. Jinkinson: If you know.

By the Witness:

A. I think they had three or four. It varied. One time they told me a couple and one time they had three. One man was in charge of it and he did most of the work. He had some helpers. He finally wound up by himself.

Q. How long did it take him to do that?

A. Since he has other tasks assigned to him besides this thing, it took him actually two months to do it.

Q. And how many months did it take you to do the work which you performed which went into the original group [fol. 35] of exhibits?

Mr. Jinkinson: I do not see the relevancy of this at all, myself. What is the relevancy of how long it took him to do the work?

The Witness: Well, if I could do it in this length of time, they sure could have been able to do it, too.

By the Witness:

A. I do not know how long it took them to do that, excepting I had to wait two months to get it, but they did not work consistently two months on this material. The rest of this was in the process of preparation, oh, let's see. The actual analysis that I performed was spread over a couple of months, three months.

By Mr. Stevens:

Q. Then how long did it take to make the revisions after the original corrections were submitted and it was decided they should be changed?

A. One month.

Q. And on that——

A. That is from computational activity and complete revision of material through the typing, of course.

Q. Is that work which you did yourself?

A. No. On corrections I had other statistical clerks as- [fol. 36] sist me. They did it under my direction.

Q. All right. Now, would it be necessary, Mr. Woolley, to go through all this work every time there was a price change if Bowman were to employ the approaches which

you have employed in your work, rather than the approaches that they employed?

A. I don't think so.

Q. Now, which——

A. All you would have to do to reflect changes in costs would be to—unless you had reason to believe that over a 10-year period, or fifteen or twenty year period some underlying changes in route structure, or something like that, had changed, or your time studies you felt were invalid now and had to be redone, barring those long-time trend factors, which undoubtedly would have to be considered every ten years; but from year to year until that time is reached, all you have to do is take the basic data in Table 8 and recalculate those for whatever period you want to cover—in this case it is a couple of months—take those factors that are contained on each of those respective tables and apply those rates as I did here in Table 15 or 16. Well, it is really Table 16—oh, 15, I beg your pardon. 15 and 16.

[fol. 37] On the basic table, you would have to revise those. Those are the only two tables you would have to change from time to time as you wanted to change the cost estimates.

The only tables you have to revise, just to get it again, is Table 8 and

A. Table 8 and

Q. And Table 8 is the difference in costs, I take it, from time to time?

A. Table 8 reflects your various cost rates that are necessary to work these tables. Table 8—now, let's see.

Q. When you say Table 8 you mean Table 8-A through Table 8-G, of course?

A. Yes, and all sub-tables. Remember Exhibits K-1, K-2 and K-3, which are the basic data to Table 8. Those, of course, would have to be revised from time to time to provide your basis statistics.

Then taking those and running them through the calculations involved in Table 8-A through D would get you the basic rates which would be applied to Tables 15 and 16, respectively, and summarized on Table 16. That is about all you have to do.

Q. And of course Table 17, too, which is where your [fol. 38] final conclusions are?

A. Well, yes, these tables would not take you more than a couple of days each. In other words, a week would do it.

Q. But if you had to make revisions in Charts I, II, III or IV, that would involve the kind of detailed work that you were required to perform?

A. Well, it would require a restudy of your whole time study, for one thing. It would require probably a refinement of much of the data that I have done here or the work I have done here on these basic tables. Yes, that would have to be done perhaps every ten years or so.

Q. But it would not be necessary to go through them one at a time and to do Table I and I-A in that particular original group of tables over again—rather, charts, I mean: Charts I-A, B, C, because——

A. Well, I would not say—let's go through this systematically now.

Q. Start it with Chart I-A.

A. All right.

Q. Insofar as your time standards reflected or described elements which really did not change from time to time, then it would be appropriate to continue to use time stand- [fol. 39] ards and then your chart would continue to have the same validity that it has today?

A. That is right. For example, Chart I, based on your customer service data, I would not expect that to change too radically. It might over a period of five or ten years when you get different personnel in with different habits, it might change the calculation, but——

Q. That, of course, covers I-B and I-C?

A. Yes. These are Roman numeral numbers. Roman numeral III and IV likewise probably would not have to be checked more than once every five or ten years.

Q. Now, turning to Chart——

A. Well, of course, depending upon the degree or rate of change of trend in the use of fiber containers. If you find a definite trend it might be well to take these mathematical formula and introduce a time factor which would be added to it which would automatically take care of your problem.

Q. But for Chart IV to be valid for the purpose of use in different periods of time and with different price structures

and different discount structures, you would have to assume that the ratio of glass to fiber was a constant?

[fol. 40] A. No, constant with respect to time, yes, but not with respect to volume. That is where you and I differ. I mean, that is what you are doing in all this structure here. You are assuming all these relationships are constant. Structural relations are constant with relationship to time until you have reason to believe the time has altered the nature of the structure.

Q. Let's assume there is no change in the time standard at all. Let's assume that if you conducted periodic time studies you would come up with the same time standards over and over.

A. That includes this stuff here, too.

Q. Nevertheless, might it also be true, Mr. Woolley, that if the relative importance of fiber or glass changed over a period of time——

A. Yes, you would have to reflect that.

Q. (Continuing) Then it would require a recalculation of the material that went into Chart IV?

A. If you are going to do this mathematically or statistically, logically and correct, what would need to be done in Charts III and IV is to use this thing for another four or five years, but keep a sampling record, much as I have done here. You would do it on a sample basis each year, just take [fol. 41] two or three months out of each year and run the same type of tabulation on it as involved in these statistics and do that each year for a period of four or five years until you have established a trend of one another.

Then you can take that mathematic trend and reflect it in your formula.

Q. Well, if——

A. Either that or else check it from time to time.

Q. If from month to month there were a substantial variation in the use of glass as compared to the use of fiber, wouldn't that require——

A. No, not for that purpose, no, because this curve represents an average. Actually, to eliminate monthly variations, you ought to use yearly data, anyway, total data, anyway, rather than just monthly, to eliminate the effect of seasonal.

There may be seasonality in this thing and there probably

is; but to do this correctly the total figures for the year ought to be used as a basis for developing these curves that I have here on Charts III and IV to start with, so that you eliminate the effect of seasonality in the thing, because your [fol. 42] discount pattern is not a seasonal thing, anyway. It is an annual or maybe a bi-annual change. I do not know how often you change a discount.

But the point is you are not changing your prices to customers—or at least I don't think you are; you may. I don't know, but you would not have to change these structural equations necessarily every months.

Q. Well, would you have to change them every time you made a cost study? That I think is the question.

A. Well, how often are you going to make a cost study?

Q. If there were reason to believe that there was a difference in the relative importance of glass or fiber at the time another cost study were to be made, would it be necessary to recalculate Chart IV?

A. If you found in your analysis of your data that you had a systematic variation because of seasonal or cyclical variation in these proportions that are involved here then I think, yes, you would have to take that into account.

Q. Well——

A. For example, if you could imagine this Chart III here, for example, on a three dimensional scheme, three dimensional pattern, like this room here, this chart here repre- [fol. 43] sents only the pattern as it would exist on that wall over there, but now the other dimension would be time, seasonality, or cyclical, whatever you want to introduce into the thing, and that curve—you would still have to take into account the structure with respect to volume, yes, but that pattern might change with respect to the season.

It might be horizontal during the middle of the year, it might be this way during part of the year, and that way during the other, I don't know (indicating).

If you are going to take that into account, my point is **the whole structure would have to be considered, not just an** average of all the stores.

Q. What you are saying, if I understand you, Mr. Woolley, is if instead of just being one constant where one month would be typical for later periods of time, you found cycli-

cal changes, you ought to take those cyclical changes into account?

A. I would assume, judging from your general formula, depending upon how frequently you want to make your cost revisions.

Q. What if you did not find any cyclical change or any significant pattern of changes, but merely had reason to [fol. 44] believe that the ratio of glass to fiber was different during the later period than it was during the period when this particular chart was made?

A. For what reason? There has to be a reason. It can't just be different, otherwise that is just more of a random-type activity that you don't need to take into account.

Q. Well, if it is merely a random activity—

A. It ought not to be reflected in a cost justification.

Q. Could it be reflected in cost justification even though it were a random activity if its effect was merely considered for the period when it was actually studied and when that sample was taken?

A. No, I would not say that was a reasonable approach. In the first place, I do not think it is relevant as source of cost difference, anyway. It is not a real source of cost difference, it is just a random observation for justifying something on the basis of something that might not exist tomorrow.

On a random basis there is no basis for using it as a basis for cost justification, to start with.

If it was a systematic variation, then I would say you [fol. 45] would have some basis for incorporating it consistently in your formula. That is, assuming it is relevant. Otherwise, no.

That is why you use averages, to eliminate the effect of random variation. An average is supposed to represent, and the statistical relationships are supposed to represent some underlying real causal relationship that governs the existence of your factors you want to use in your formula.

Q. Well, in your view, is there such a real relationship —and this is apart from your opinion as to whether it should be taken into consideration under the Act; but is there such a real relationship with respect to the glass-fiber situation?

A. I think there is a real relationship, yes, with respect to size of stores.

Mr. Long: Why don't we take a recess now?

Mr. Woolley, would you like a drink of water?

The Witness: Yes, I think I would.

Mr. Long: Why don't we recess at this time for a few minutes?

Mr. Stevens: All right.

(A recess taken.)

[fol. 46] By Mr. Stevens:

Q. Directing your attention to Chart IV-A of the proposed material, first of all on my photostat of the copy in the lower right-hand corner between the four hundred and six hundred point indication, there is what appears to me to be a smudge there.

A. It is a smudge.

Q. That is not a dot on the chart?

A. No, no.

Q. It should not influence the direction of the line there?

A. No. I think that was an error in the original plotting and it was not quite erased.

Q. Now, would you tell me, Mr. Woolley, what Chart IV-A shows?

A. Chart IV-A shows the results of the tabulation of the number of glass containers as a percentage to the total number of containers delivered to independent stores, as related to the average number of points delivered to those stores at the same time.

Q. Now, was there any particular mathematical technique used in shaping the line which appears on Chart IV-A?

[fol. 47] A. That was just a freehand curve drawn through the middle of the line. This is on semi-logarithmic paper, if that means anything to you.

Q. You say it is on semi-logarithmic?

A. Yes, it is a semi-logarithmic paper.

Q. What is the difference between logarithmic paper and semi-logarithmic?

A. Well, on logarithmic paper you have the scale on both angles of the paper, both directions. This has it only on one direction. I did that in order to simplify the scattering or reduce the variation on the paper itself of the observation that I was dealing with so I could get a better picture of how it smooths out.

Q. Now, Mr. Woolley, if the line on Chart IV-A had a different shape than the one it does have, is it not true that it would be necessary to change the figures in several of the tables which are in your material?

A. Oh, certainly.

Q. For example, to be specific, if the line on this Chart IV-A were changed, is it not true that that would require a change in a recalculation of data on Table XIV?

A. I think so, XIV, yes, because that is the purpose [fol. 48] of this thing as it developed the number of cases and number of containers reflecting this percentage from independents. It entered into the formula.

Q. Now, the data in certain columns on Table XIV is merely a reading of what the line portrays.

A. An interpolation.

Q. On Chart IV-A. Now, on which columns on Table XIV are you really doing nothing more than reading the line which is sketched on Chart IV-A?

A. Column 3.

Q. Column 3? The title of Column 3 begins, "Fourteen hundred," and runs down to fifteen hundred?

A. That is right.

Q. And that really is a fifteen per cent. Isn't that really what we are talking about in the column at the bottom?

A. At the bottom, yes.

Q. Now, if that column were changed, would that cause changes in other columns on Table IV?

A. Every one of the columns on the right.

Q. On Table XIV?

A. For the independents.

Q. And if IV-B were changed——

[fol. 49] A. Specifically it would change Columns 4, 5 and 6.

Q. And then would that not in turn require a change in Table XV, in practically every column on Table XV?

A. It would change the independents, it would change all

of the—well, leave out the store size column; it would change Columns 1, and I think 2—yes, 2.

Q. Would it also change——

A. Of course it would change——

Q. Would it not also change the columns which are headed with the footnote Pegs of 6, 7, 8 and 10?

A. Yes.

Q. And then over on the right——

A. Also 12.

Q. Also over on the right the column pertaining to independents for March, 1955, with the footnote "12" and also similarly for the footnote "December, '55"?

A. It would also change on 16 and it would change the costs for bottle expenses, milk room wages and costs.

Q. And then the total costs?

A. And the total costs for independents, the average costs, of course, too.

Q. And the driver's service costs?

A. That is right.

[fol. 50] Q. And then, as you say, the daily unit costs per store?

A. That is right.

Q. Then 17 would require changes, too?

A. Yes—well, changes in unit costs and independents, and, of course, the relative difference.

Q. And the relative difference. It would go all the way to the conclusion of the study?

A. Well, assuming the unit costs for the chain stores did not change, yes, because if they changed that might be offset or it might be added to it.

Q. No, but I am assuming everything remaining the same except the line on Chart IV-A were moved a little bit.

A. That is right.

Q. And if the line on Chart IV-B were moved a little bit, you would have corresponding changes in all these tables except that the changes would pertain to chains rather than independents?

A. That is right.

Q. Now, on Table XIV, for example, the Column 3, to what degree of accuracy do you purport to read and interpret the line which is portrayed on Chart IV-A?

[fol. 51] Oh, I think I can read it just as I see it there.

Q. Well, is it within——

A. Within the third decimal place.

Q. As to the one hundredth of one per cent really, because you are talking about percentage?

A. This is one-tenth of one per cent. This is ratio. These figures are 14.85 per cent, so in terms of the ratio it is .1480.

Q. And you can read it to the——

A. Tenth of a per cent.

Q. Tenth of a per cent, which is the fourth figure to the right of the decimal point?

A. No, third.

Q. The third figure to the right of the decimal point in Colume 3?

A. Yes.

Q. Of course, you have on occasion differentiated between, for example, .1480 and .1485?

A. Well, that is my interpretation by virtue of the fact—Remember now, this is a freehand curve, and if I had a mathematical formula like I did on Chart III here, and set it down, actually computed it out, it would move in a smooth pattern.

[fol. 52] Now, all I have done here is I first made the first approximation in terms of, I think it was tenths of a per cent, and then interpolated just a gradual interpolation from each level upward, in order to get sort of a smooth transition.

Q. Well, now——

A. It is a rough approximation.

Q. How much in terms of figures in Column 3—what is the one space on the chart equal to?

A. What do you mean? I don't understand you.

Q. Well, would moving the line up one space change——

A. For example, from 100 to 120? Take a 100-unit store and a 120-unit store. Do you mean from 13 to 1350?

Q. No, I am talking about Column 3 and I am asking you——

A. Table XIV?

Q. (Continuing)—on Table XIV, and directing your attention to IV-A, I am asking you if the line on Chart IV-A were moved up just one space, how much of a change would that produce in the figures in Column 3 on Table XIV?

A. Oh, I see what you mean. It would be two per cent, [fol. 53] two percentage units.

Q. In other words, the last group of figures instead of being fifteen per cent would be seventeen per cent?

A. That is right. If you shifted the whole curve up.

Q. Just moving it one space would move all these figures two per cent?

A. Two percentage points.

Q. Two percentage points?

A. That is right.

Q. Now, how many percentage points are occupied by the dots which you purport to read? Don't they each occupy about two percentage points?

A. About half. Remember, when I plotted these things, I plotted a small pinpoint about the size of that pencil lead.

Q. I take it you have already stated that the location of this line, its shape and slope, were not calculated by any mathematical formula but rather this was a freehand sketch which represented your judgment?

A. It was a visual observation reflected there.

Q. Now, did you have any means, any mathematical formula or statistical type of test by means of which you could verify the accuracy or skill with which you attempted [fol. 54] to sketch this line?

A. Oh, by taking the trouble I probably could have fitted a mathematical curve with which to test it.

Q. That isn't my question. My question is: Did you?

A. No, I didn't. I did not deem it necessary.

Q. Now, can you——

A. Because if I had I would have come out with a curve probably similar to this. The deviations between them would not be too far apart.

Q. Can you explain why, for example, the line on the right-hand portion of the chart does not come closer to the dot which is furthest to the right on the chart?

A. That is because I considered this to level out.

Q. Now, if the line had run through that right-hand dot instead of being placed by your sketch two or three spaces below the dot, what would the percentage figure for all the lines in the bottom portion of Table XIV have been?

A. Oh, about—you mean if you drew a straight line through there?

Q. If the line had gone through that dot?

A. If that line had gone through there? Oh, it would [fol. 55] be close to 24 or somewhere in there.

Q. Instead of 15?

A. Yes.

Q. And is it not true that all of your calculations in these various tables that we have indicated would be modified if the line were changed, all of those calculations would be changed in a manner which would tend to indicate a higher cost of serving chains—excuse me, serving independents if the line had been moved closer to that last dot?

A. If it had been, yes, I think it would work in that direction.

Q. Now, the degree of accuracy carried out to the fourth and fifth decimal place in these various charts really is all dependent on the accuracy with which you exercised your judgment in sketching in that line, is it not?

A. Certainly.

Q. Now, did you employ any mathematical principle or accepted statistical approach in determining what groups of data to use in picking the dots that find their way onto Chart IV-A?

A. I merely classified all these stores according to—— [fol. 56] Q. According to what?

A. Arbitrary size classes, from zero to five, five to ten, and so on up the scale of selected units.

Q. Now, are those the size classifications which are shown on Table—is it 12 or 13? In other words, from zero to five, five to ten, ten to fifteen? In other words, the five point level is up to fifty, a ten-point level from fifty to a hundred, twenty-point levels from one hundred to two hundred, and then a two hundred point-level from two hundred to four hundred, and then an infinite division over four hundred?

A. Yes.

Q. Now, what factors influenced you to use categories of one size below fifty, and another size from fifty to one hundred and still another from one hundred to two hundred and still a different one from two hundred to four hundred?

A. That is the usual statistical treatment of data where you have a wide dispersion of data.

Q. Did you use the same intervals in making the calculations and groupings that went into Chart IV-B?

A. No, because their levels are different. Their range is different.

[fol. 57] Q. Now, is it not true, Mr. Woolley, that a different grouping would produce different dots?

A. But not necessarily different conclusions.

Q. Might not different groupings produce a different shaped curve?

A. Slightly, but not statistically, though.

Q. Did you experiment with any different groupings?

A. No, I did not feel it necessary.

Q. Did you try any alternatives at all?

A. No.

Q. Well, now, isn't it true, Mr. Woolley, that if instead of using the first groups of zero to five and five to ten, you had used a group from zero to ten, that instead of having two dots on your left-hand portion of Chart IV-A, just above 8 to the left, you would have one dot instead of those two?

A. On the other hand, I could have gone the other way and divided it from zero to five and gotten additional dots that I don't have here.

Q. My question is whether——

A. Oh, of course, I could average the whole thing out and take one average, but that is not what I wanted to do. That destroys the purpose of my analysis. I want to show the [fol. 58] effect of size. The statistical procedure involved is to get as many size classes as you have need for.

The more size classes you can obtain then the better off your relationships are going to show up.

Q. Well, now——

A. Assuming you have got sufficient data to handle it. Of course, the more size classes you have to use or need, the more data you need and the more observations you need.

Q. How many customers would you say you should have in a class before considering it a valid size classification?

A. Well, that depends on what your population is.

Q. Well, did you make any such judgment before you drew this chart?

A. If you have in a given size class—if you know beforehand there are only one or two stores, then you should take those one or two stores and that is your population.

There is no question of sampling. But if you have got a hundred of them you can use, say, five, ten, fifteen.

Q. I am asking you about the examination or analysis [fol. 59] you would make before you determined the size class. Would you feel that there would be any requirement that there must be a given number of stores in a class in order to justify having a separate dot for that class?

A. There ought to be around, at least eight or nine or ten as a minimum.

Q. Would you say the same thing with respect to all the charts you have prepared, or does that only pertain to Chart IV-A and IV-B?

A. Oh, that is a general statistical concept. A lot depends on population you are dealing with. It is conceivable you might have a population but you would only have a couple of hundred observations to start with.

Q. Now, subject to your verification later, I would like to show you my copy of Chart IV-A in which I attempted to combine the first two groups from zero to five, five to ten, into one group of from zero to ten.

First of all, I would like to ask you how I should do that by the material in 12-A, if I were to do it. Should I not add the number of stores in all divisions, namely, 27 and 61 altogether?

[fol. 60] A. Let's see, that is Table——

Q. 12-A.

To get the number of points, isn't it correct that you would take the column under 12-A beginning with 27 and 61 and add those?

A. I think you would be safe in adding 68 and 393, probably.

Q. Pardon me?

A. What are you talking about now, points?

Q. What did you suggest?

A. Oh, no, you would have to take the total number of points, not the averages. You would have to go back to the total number of points represented by those two classes.

Q. And that is on 12-A, is it not? You would be adding 87.7 and 466.6 there?

A. Yes.

Q. All right, then you would get the average number of

points per store by adding the stores 27 and 61 for a total of 88, and then dividing one of those figures by the other would give you an average, as we figure it, of 6.3 points per store, if that is your grouping.

A. That is right.

[fol. 61] Q. Now, to determine the number of containers you would go to 13-A?

A. Do the same thing.

Q. And add 68.8 and 393.4, getting a total of 462.2, and that figure would be——

A. Divided by the total number of stores.

Q. Divided by the number of stores?

A. Yes. According to our calculations we got a figure that would be about five, or something like that, six.

Q. All right. Well, we attempted to do that, Mr. Woolley, and what I did, I drew a red circle and crossed out the two dots that I intended to eliminate and put a red dot where I felt the new dot would be just to get a rough idea. Is that the kind of change that would be made by that change in the grouping at that level?

(indicating)

A. Well, I think you misplotted it. It would be a little higher, actually. It would actually show up higher than where this plotted black dot shows.

Q. Red spot?

A. It should be a higher figure.

Q. Well, where should it be.

[fol. 62] A. What you are averaging in effect is this dot and this dot, so the average should fall somewhere between the two. It should not be below it. It cannot be below it. Remember, you are talking about percentages here. You are not talking about absolute figures.

Q. Well, now, it could be only a trifle above it, could it not?

A. It would not be below it. It would be slightly above it. It depends upon the weights. They are weighed in terms of Class 10, so it would be above that. How much above it, I don't know.

Q. Well, you will notice on Table 12-A your second group of stores has sixty-one stores, and in the total here has eighty-eight, so it would be more heavily weighted.

A. Naturally, my point is the dot would lie somewhere

between wherever that figure is—here, I will show you between 14 and 7. It would be about 7½ or maybe 8.

Q. Well, now——

A. As an average.

Q. Let's figure more precisely. You said 6.3, that is the number of points.

[fol. 63] A. Take the total number of points and the total number of containers and divided by the total number of stores. Well, you have to get the average number of glass containers, too.

Q. 6.3 is the point at which the dot would fall on the horizontal axis. Why don't you calculate it out?

A. Because, look, I have got a seven per cent here—oh, I beg your pardon. Let me get back here so we can get in harmony.

All right, I have got 7.6 to start with and three points and a quarter——

Mr. Stevens: Let's go off the record a minute.

(Discussion had off the record.)

By Mr. Stevens:

Q. Mr. Woolley, just to recapitulate since we have been off the record, the two points on the left-hand side of Chart IV-A, I take it, are taken from Tables 13-A and specifically the column the fourth on the right of 13-A which is "Percentage of glass containers delivered daily for all divisions," and you have got 18.46 for the zero to five bracket, and 8.26 for the five to ten bracket; is that correct?

[fol. 64] A. That is right.

Q. And in the left-hand of the chart, the dot is at the level of 18.46?

A. That is right.

Q. Now, if those two brackets were combined into a single bracket of from zero to ten, is it not correct that those two left-hand dots would be omitted from the chart, and there would be substituted a single dot which would be placed between the six and the seven on the bottom, the horizontal axis, at a point of about nine per cent. In other words, slightly above the second dot but below the first dot?

A. That is right.

Q. Now, my question to you, Mr. Woolley, is whether if that regrouping were made, would you have drawn the same shaped curve that you did draw on Chart IV-A?

A. I do not know without having to do it.

Q. Well, if merely that one change were made?

A. Not necessarily. I do not know how it would affect the other dots. It might or it might not. I don't know.

Q. And if——

A. For example, if you took up the other end here, and [fol. 65] took the group from four hundred, that big dot you talked about originally, then you took the next dot to it, down around three hundred, and averaged those two out, as you did the lower one, you would get a figure that comes closer to the line where it now stands.

In other words, if you averaged those two extremes there like you did these two extremes down below at the other end of this curve, you would have a dot that would result in a position just slightly below the line instead of so far off where it is.

Q. Well, now——

A. As a matter of fact, you could do this. I can tell you what it will do just by taking these figures right as they stand now on the dot. Take the next two dots. You have already handled two dots, haven't you?

Q. Yes.

A. All right. Take the next two dots and draw an ovular circle around the two, just connecting the two by a line. I don't care what you do—or just use a straight line.

Now, if you took the average of those two dots like you did the other one, it would fall exactly right on that line, [fol. 66] on the curve where it now stands.

Then if you took the next two dots it would be slightly above it. If you took the next two dots it would be right exactly on it. If you took the next two dots it would be slightly below it. If you took the next dots it would be slightly above it.

So the general shape of the curve would not change at all.

Q. Well, would there be any basis, if you made all those changes, for the portion of the curve to the left of No. 6 on the horizontal axis, would there be any basis for bringing

the curve as high as it goes, namely, almost up to twenty-four?

A. Certainly, because you cannot ignore the more detailed data. As a matter of fact, I should even have a finer classification than I have here, probably.

Q. Well, can you explain why at the left-hand side the line goes through the dot, whereas, at the right-hand side it stays about five or more percentages below?

A. It is only because of the vast difference between the number of observations involved.

Q. In other words, it was your judgment on the basis of the number of observations involved that the dots for [fol. 67] stores which have an average number of points delivered daily of only three units was much more significant than the dot for the stores which——

A. I have enough observations in the smaller class of twenty-seven cases in which to use that information.

Q. But with respect to the portion of the line that is covering the area between, say, two hundred points and on up, your data is less complete, is it not?

A. It is still usable.

Q. Is it less reliable because it is less complete?

A. Well, the dispersions are a little larger, because the number of observations is smaller. Yes, but it is not necessarily insignificant.

Q. Do you think the data for independent stores of volume over two hundred, as portrayed in this Chart IV-A, is sufficiently complete and reliable to base an accurate cost study on?

A. On the basis of taking two hundred and over, on the basis of purely small sampling, yes, because there are sixteen observations involved and that is sufficient to draw a conclusion as to a location of an average point.

Incidentally, that is why I grouped these large enough [fol. 68] so I would have sufficient observations in a class that would give me a reliable statistic for that class.

Q. Well, is it your position—I just want to be sure I understand—if you regroup all those points in different-sized classifications that that would cause no change in the shape of the line?

A. In the manner you were suggesting, it would not change it, no.

Q. Well——

A. I mean, consolidating classes won't change that curve excepting on extremities.

Q. But it might change it on extremities?

A. It is possible.

Q. And if it changes it on extremities, it would change——

A. If you change it on extremities on the higher end—well, no—actually on the higher end it will not change that at all. On the lower end it might suggest a change, but I would not change it anyway, because I have enough observation down below to justify the curve as it stands.

As a matter of fact, I could even break those into classes [fol. 69] in half again and I do not think it would change the curve too much. It might shift a little bit one way or the other. It would be interesting to see, because I have got enough observations to do it.

Q. Well, in any event, I think you have indicated you did not experiment with different groupings, and on the basis of the discussion we have had so far today, none of the suggested different groupings which I have presented to you would persuade you to change the shape of the line at all?

A. No, sir.

Q. I take it that would be true with respect to IV-B as well as IV-A?

A. In general, yes.

Q. And it would also be true with respect to IV-B as well as IV-A that you did not compute it on the basis of any mathematical formula, but merely exercised your own judgment and skill as a draftsman?

A. Which is the usual thing a statistician would do when it comes to a complicated computation, they use a freehand method, and having had a vast experience in the use of statistical data and fitting curves to it, I feel confident it represents somewhere in actuality as far as these data [fol. 70] are concerned.

Q. Well, let's look at IV-B for a moment.

A. IV-B?

Q. Yes. Is it not correct that each of the three dots on the left-hand portion of that chart represent only one store each?

A. That is right.

Q. Now, is that a sufficient sample in order to justify the use of a dot?

A. I think in this case it is because I think from your own cost study texts you indicated that below one hundred, or something or other, you only had one or two chain stores below one hundred units, anyway, so that represents your population. So it is valid to use it.

If that is your population, that is it. It is not a sample. That is your population.

Q. If you eliminated those three dots——

A. You can't eliminate them because they are part of your population.

Q. If you eliminated those three dots, would the shape of your curve have been the same?

A. Certainly—well, no, no. I beg your pardon. It would [fol. 71] not be the same, but you cannot eliminate it. I don't agree you can. I don't agree with your proposition, because that is your population.

Now, if that were simply a sample, there would be a question—you could legitimately question as to the validity as to the shape of your curve, but that being the population, you can't.

Q. Are you equally confident of the validity of the shape of this curve as the validity of the shape of the curve on Chart IV-A?

A. No, I would rather have more data. Frankly, what I probably should have done is ask you for a complete tabulation of all chain stores. But I didn't. I just used this as a sample.

If I were doing it over again I would have—Chain stores are such a small portion in terms of number of stores, of your store population, it would be better to use the entire population of chain stores.

Q. What degree of error do you think may be present in Chart IV-B?

A. Five per cent. Not five percentage points. I am talking about five per cent. Take any one of those points on the curve and take five per cent of it, possibly ten per [fol. 72] cent.

Q. Let me just make sure I understand. A square equals two per cent in terms of glass containers?

A. That would be two-tenths of one per cent.

Q. So you mean it might move the line one-tenth of one space in one direction or another?

A. Two-tenths of one space.

Q. Each space is——

A. Two-tenths. Each space is two percentage points.

Q. So, in other words——

A. Oh, no, no. (Witness examining document.)

By the Witness:

A. Oh, yes, that is right.

By Mr. Stevens:

Q. It would not move it as much as the width of the line at any point?

A. No.

Q. You are satisfied that this is reliable? At least that it should not be changed more than the width of the line itself at any given point?

A. I will tell you. Oh, no, I did not do it on this. I did it on the others.

Q. Your answer is yes to that, I take it?

[fol. 73] A. I am sorry.

Mr. Stevens: Would you read that back?

(Question read by the reporter.)

By Mr. Stevens:

Q. And I am referring to the line on Chart IV-B.

A. You mean the drawn line?

Q. The line you sketched in, yes.

A. Probably not more than—oh, ten per cent, I would say, would be right. That is just my judgment.

Q. Well, now, that line is drawn from the data which appears on Table 13-B—is it not, 12-B and 13-B?

A. I think so. It should be.

Q. And directing your attention to Table 13-B, is it not correct that the data is drawn from the column which is under percentage of glass containers delivered daily, the column headed, "All divisions," that that is the one from

which you get how high up the points will be on the vertical axis?

A. That is right.

Q. Now, is it not correct, Mr. Woolley, that in the revision which you made and have most recently tendered to us you made a number of changes in the figures which appeared in that column on Table 13-B as compared with [fol. 74] the original submission?

A. I think so. What are those two? It wasn't those two particular small classes, but it was somewhere in there.

Q. Do you have available your original submission so we might ascertain that to be a fact?

A. Do you want to see this, you mean? (indicating)

Q. No.

A. There were no changes down in that lower class. Changes took place from 180 units and above.

Q. First of all, let me ask you a preliminary question, Mr. Woolley. If the line on Chart IV-B were at a lower point—went through a lower area than the area through which it does go, would not the effect of lowering the line be to produce a lower cost of serving chains in the ultimate calculations, to summarize a lot of steps?

A. Let me see. Assuming that curve shifts downward?

Q. Yes, on IV-B, the one pertaining to chains.

A. Let's see.

Q. Thereby showing a smaller percentage of glass containers, which in turn would be reflected in a lower cost of delivery to chains?

[fol. 75] A. That would reduce the number of containe 's? Yes. Reducing the number of containers would lower the estimated cost, yes, for that class.

Q. All right. Now, going back to the comparison of your original submission of Table 13-B and your revised submission of 13-B, is it not correct that on the original submission for the volume bracket of 180 to 200, you had shown a percentage of 7.08?

A. Now, let's see. I don't recall what the percentage is but I know the figure would change. I don't recall whether I kept the original percentages or not.

Q. We have a copy of the typewritten one if it would help you. I don't know if it would help you at all.

A. You are talking about Table——

Q. 13-B.

A. Yes. All right, I have got the revised 13-B.

Q. I want you to get the original 13-B. We have a copy.

A. Well, wait a minute.

(A short intermission took place, after which the deposition was resumed.)

The Witness: O.K.

[fol. 76] By Mr. Stevens:

Q. All right. Now, is it not correct that on the original submission—

A. Pardon me, but for example, on your original figures, what do you have for the lowest classes, seventeen seventy-nine and seventeen fifty-six? This is the original tabulation I made that I have reference to. I am not sure it is exactly the same figures.

Q. 7.980 is the total.

A. That isn't it. Excuse me. All right.

Q. Do you have it now?

A. Zero to ninety and ninety to one hundred, right?

Q. Right. Well, that is true on both of them.

A. Eighteen, six, five. All right.

Q. Now, the first change I am trying to identify, is on the original calculation for the volume bracket of 180 to 200 points delivered daily.

A. Yes.

Q. You showed a percentage figure of 7.08.

A. Check.

Q. And that was revised downward to a figure of 5.46?

A. Correct.

[fol. 77] Q. The next bracket from 200 to 250, your original submission showed a figure of 6.09, and that was revised down to 4.09?

A. Right.

Q. Now, just stopping there for a moment, is it not correct that the Chart IV-B which you submitted to us, remains in the same form after the revisions as it did before the revisions?

A. That is right.

Q. In other words, it was calculated on the basis of the

dots which were plotted from the original 13-B, rather than the revised 13-B?

A. That is right.

Q. Now, if the dots for the two brackets we just discussed, namely, 180 to 200 and 200 to 250 had been replotted after Table 13-B had been recalculated, each of them would have been moved down about two percentage points, is that not correct?

A. That is right.

Q. Now, then, take a look, if you will, at the brackets 400 to 450. In your original submission the figure you had was 11.57 per cent, is that not correct?

A. I think so, yes.

[fol. 78] Q. And was that not revised to 8.59 per cent or a reduction of about three per cent?

A. That is right.

Q. Now, again, that would mean that the dot on Chart IV-B, which is between 400 and 500, and sort of a peak of a pyramid there would actually have been lowered to fall right on or just about on——

A. Which one? Excuse me.

Q. (Continuing)—the average line of eight per cent?

A. Four hundred per cent?

Q. Yes, the one between four hundred and five hundred?

A. Oh, yes.

Q. Now, in your judgment, would not the moving of those points require some modification of the shape or the slope of the curve portrayed on Chart IV-B?

A. Not sufficient for this purpose. In the first place, the lowering of the first two would just change the slope in that area. In other words, tend to raise the slope in that area. As a matter of fact, because the other data did not change significantly, I don't think there was any significant change.

These three I did not give too much weight to. As a matter of fact, it tended to, if anything, broaden out the [fol. 79] valley there.

Q. Wouldn't the effect of all of the changes that we have indicated been to flatten out the line?

A. No, no. All it would tend to do, it would tend to—as far as I am concerned, tend to sharpen the first slope and

broaden out the valley of the rest of it. That is all. It would extend it back a little bit and make it sharper.

In other words, it would just make a more broad valley below the line, that is all.

Q. Well, in your judgment, you could move those three points from two to three percentage points downward without affecting the slope or shape of the line?

A. I think so, significantly.

Q. Could you eliminate those dots without affecting the slope or shape of the line?

A. Well, if you eliminated the two small ones, it might raise it a little bit. If you eliminated the middle one which you are talking about, I do not think that would change it too much, because you have got these others to counterbalance it.

Q. How many dots do you need in order to get a line that you consider sufficiently reliable for use in predicting [fol. 80] costs in a study of this kind?

A. Oh, something over ten. In other words, size classification determines the number of observations you are going to have, in which case we would have here about fifteen.

Q. Well, now, is it not true, Mr. Woolley, that there was another change in the bracket between 600 and 700 points where a correction was made from the orginal submission of 8.5 to a revised submission of 7.86?

A. I think so.

Q. Then, as you say, there was another one in the bracket between——

A. Enlarged from 900 to 1,000.

Q. —in which there was a reduction from 8.14 to 7.96?

A. It is not significant.

Q. Now, did you after making the revisions which are shown in the new Table 13-B, do any replotting and experimenting to test whether in your judgment it would be appropriate to draw different-shaped curves?

A. I might point out in the category 400 to 450, the revision went from 11.57 up to 12.08. I think that is right.

[fol. 81] Q. Well, what is the figure in the 400 to 450 now? 8.59, is it not?

A. Well, —oh, I see, yes. Yes, that was a reclassification of some stores. That is what happened. Reclassification of stores between the 400 to 450 and 450 to 500 is what

happened, so you have an insert of a point of twelve units. You took one store out of a large value, in other words, and reduced it.

Mr. Stevens: Would you read, Mr. Reporter, the question I asked a minute ago?

By the witness:

A. (Continuing) You have a counter-balancing influence there.

Mr. Stevens: Well, I will ask the same question again.

By Mr. Stevens:

Q. Mr. Woolley, after making the recalculations which are found in Table 13-B, did you do any replotting of points or rechecking of the shape of Chart IV-B to determine whether or not in your judgment the shape of the curve retained the validity which you originally thought it had? [fol. 82] A. Yes, I came to the same conclusion.

Q. You did actually replot the points?

A. On my work sheets I did.

Q. Do you still have the work sheets that you replotted them on?

A. No. All you have to do is just like we have been doing: I just took the resulting figures and compared them with what they actually showed on the original chart I made.

Q. You formed the opinion that moving those various points we have identified down a per cent or two would not change the curve?

A. And up. There was a counter-balancing on that, too.

Q. There was one counter-balancing, is that right?

A. I think so.

Q. And that was an increase from 11.57 to 12.08?

A. No, it was from zero to twelve, I think.

Q. Yes, but what happened: I mean, the only way in which there was an increase was where there had previously been a point at 11.57, which was eliminated, there is now a point at 12.08?

A. That is right. It had another observation added. [fol. 83] That is what happened.

Q. And you feel that—For what volume classes is this curve reliable for making predictions as to the relationship of glass containers to the total number of points delivered daily?

A. Oh, I think——

Q. You think——

A. I would take the entire range as plotted there.

Q. You think it is valid between the area between fifty and sixty points?

Mr. Jinkinson: Do you have much more? It is after twelve-thirty, you know.

Mr. Stevens: Oh, I am sorry. Yes, I have got quite a bit more.

Mr. Jinkinson: Well, then, let's go to lunch. We can come back.

Mr. Stevens: Fine.

By the Witness:

A. The answer is that that is a hypothetical. It probably is.

Mr. Stevens: Let me just ask one more question. It is relevant right now.

Mr. Jinkinson: Surely.

[fol. 84] By Mr. Stevens:

Q. If in your predictions you find a difference between the effect of the curve, such as you do in the range between 90 and up to about 180, and the actual experience of the only three stores involved in that area, which in your opinion is the more relevant data to use in making judgments as to the costs in serving customers in those ranges?

A. Would you restate that?

Mr. Stevens: Read him the question, please.

The Witness: No, I would like you to restate your question.

Mr. Stevens: All right.

By Mr. Stevens:

Q. All right.

If, in making your cost analysis, you find that there is a difference between the result which would be produced by taking your data from the curve and the result which would be produced by taking the actual data—and I suggest there is such a difference in the Chart IV-B between the ranges of 90 and about 180——

A. Yes.

[fols. 85-86] Q. (Continuing)—Which basis would you use for purposes of making your analysis?

A. I have to be consistent; since I am using the curve for the other areas, I have to use it for the lower areas, also. Either that or change the shape of the curve.

Mr. Stevens: All right. We will break for lunch now.

(Whereupon a recess was taken in the deposition hearing of the above-entitled cause until 2:00 o'clock, p.m. of the same day, September 11, 1958).

[fol. 87] September 11, 1958

Elliott B. Woolley, having been previously duly sworn, further deposeth and saith as follows:

Cross-examination. (Continued)

By Mr. Stevens:

Q. Mr. Woolley, the data on Tables 13-A and 13-B, shows your conclusions from the sample used of the ratio of glass to fiber containers at various volume levels, and also those tables, as I understand them, at the bottom show aggregate figures.

A. Yes.

Q. Do I correctly understand the charts to indicate that if you combined all independents, at least in the sample you reviewed, that the percentage of glass containers used by independents on the whole would be 11.21; is that right?

A. That is right, sir.

Q. And that there would be a lesser percentage for chains, as indicated by Table 13-B?

A. That is right, sir.

Q. And that percentage for chains was what.

A. 7.68.

Q. 7.68?

A. (Witness nodding head.)

[fol. 88] Q. Now, I believe this morning you said that it would be possible to make a mathematical calculation or series of calculations to test the validity or accuracy of the line which is sketched on Chart IV-B, is that correct?

A. It would be possible.

Q. If that is true, is it not essential in such a calculation that the line be capable of expressing in some form of a mathematical equation?

A. It could be, but not necessarily so. I mean, it is not necessary in some cases.

Q. I mean, there is a method of testing a line?

A. Yes. I could have done the same thing to this Chart IV-B as I did over here to Charts III-A and B.

Q. Why did you do it for Charts III-A and B and not for IV-A and B?

A. It is a question of simplicity versus complexity on the other hand.

Q. In which of the two Charts III or IV did you attain a higher degree of accuracy?

A. Not because one is mathematical and the other is a freehand drawing, but mainly because of the nature of the scatter diagram involved.

Q. Well——

[fol. 89] A. In the case of the Chart III-B.

Q. The III-B is the one in which in your judgment the line is a closer fit to the dots?

A. That is right.

Q. (Continuing) Than is the case with IV-A and IV-B?

A. Let's put it the other way around; the line represents the data more accurately because there are less variations from the line than in this Chart IV-B.

Q. And that you could determine merely by inspection of the two charts, could you not?

A. That is right.

Q. III is more accurate than IV?

A. That is right.

Q. Well, then, why is it that it is on III rather than on IV that you elected to make the mathematical check?

A. Because the mathematical formula involved in III is less complicated than this one. (indicating) This would be quite a complex procedure.

Q. The mathematical formula involved in checking the accuracy of Charts III-A and III-B is a rather simple formula?

A. For example, when I compared Charts IV-A and B, I hoped I would come out with a simple relationship rather [fol. 90] than the complex relationship that exists here. I hoped it would come out in a straight line, you know, in absolute terms or on a logarithmic basis like it showed up in Chart III. I could not do that.

So, rather than spending the time and the additional accuracy involved in fitting mathematically the curve represented by the freehand curve, it would not justify the time it would take, in my judgment.

Now, if I had the burden of actually developing this in final form the formulae that are necessary for making a cost study like this, I would probably be more precise and probably for future use it would be more needful to reduce this thing to a mathematical formula for purposes of future use. But for my purposes here this is sufficient and is a reasonable approach to the problem or a reasonable solution to the problem.

Q. I take it the lines on Charts IV-A and one on Chart IV-B also are not intended by you to be symmetrical, either one of them?

A. No, no, it is just drawn so that it would follow the data such that the deviations from those data would tend to be normally distributed about the line.

[fol. 91] Q. And the shape of that line does not fit any commonly known mathematical shape, such as a parabola, or anything like that?

A. No, that would probably come out in terms of an exponential curve. It would be quite complex and probably difficult to fit. Incidentally, this technique of freehand drawing to represent data that have an underlying complexity in terms of mathematical formula is a well-known and well-used technique. It is used all the time.

Q. Is there any method of testing whether this is a more reliable or reasonable approach than taking a simple average?

A. Yes, yes. I could take the observations from this curved line I have drawn in there, which are in statistical theory the expected values, and then take the actual observations from them, as observed by the dots on the chart, those deviations, and then I could figure out what the standard error is.

Q. Could you by such a procedure tell whether the measure of error from this chart was more or less than the error would be if you used just a simple average?

A. Oh, sure.

[fol. 92] Q. But I take it you have not done that?

A. No, I have not done that because I don't think it is necessary in this case, because I can tell from my own past experience—I can do it if you want me to, but from my own past experience, I did not do it for myself because I could see from the nature of the scatter diagram that it is within the reach of the realm of reason and probability.

Q. Let's look at Charts III-A and III-B for a moment. You have a formula or formulae for III-A and III-B which, I take it, are the mathematical equivalents of the line which was drawn there?

A. Yes, sir.

Q. And I take it the figures in the parentheses on Chart III-A, over the Vi, are intended to indicate an exponent of that number?

A. That is right.

Q. Now, if you were to prepare a formula with your IV-A and IV-B, would it be a formula with some kind of an exponent like that involved?

A. Probably not. It would probably be an exponential where V would be the exponent and the base would be some constant term, if you catch the significant difference [fol. 93] between the nature of the two curves in terms of the scales and the fact I am using semilogarithmic paper here.

Q. Yes. Now, without taking the same time as I did with the Chart IV, it is true with respect to Chart III and Chart III-A and III-B, is it not, that if there were a change in the slope of the line—we will assume it is going to be a straight line in any event—that would change the figures on this whole series of charts and change the conclusions?

A. Yes.

Q. This is one of the basic parts of your development which if changed would change everything that followed?

A. That is right, where applicable, of course.

Q. Pardon me?

A. Where applicable, although I think this particular one is really basic to everything else.

Q. I think this one really changes everything else.

A. Everything else hinges on this. (indicating)

Q. If there are any exceptions to that, we can identify them later, but I think we would identify a whole series of columns and tables if we went through the whole series the way we did the other?

A. I think you are right. Everything else would change. [fol. 94] Q. III-A affects the independents and III-B the chains. Then either would affect any comparison made?

A. Yes, that is right.

Q. Now, do you have any opinion as to the degree of accuracy of the lines in III-A and III-B?

A. I worked out the standard error, the correlation coefficient and degree of significance for those two lines.

Q. Well, Charts III-A and III-B are charts that you did revise when you went over the material the second time, aren't they?

A. Yes.

Q. Maybe you have your computation of the degree of accuracy of the original form of Charts III-A and III-B?

A. Oh, yes, here they are. (indicating)

Q. Which do these pertain to, the original form or the revised form?

A. This is the revised. The ones as they appear now are in your corrected chart. Now I computed the correlation coefficient.

Q. Which are we talking about, III-A and III-B?

A. Well, particularly right now I am talking about III-A, [fol. 95] independent stores. I computed what statisticians term the T test, which is the ratio of the parameter itself to the standard error of the parameter and also determined the significance through using the Z test, as a measure.

Now, that is all Greek to you boys, but without getting into a lot of detail, that is what it came out to be. Now, that resulted in a level of—well, maybe Mr. Havemeyer

can guide you on this point; the value of Z came out to be 3.876.

Q. Would you give me the figure again?

A. 3.876. Now, let me give you the correlation coefficient so you will know what that is. That is .99914 where perfection is unity. So that gives you a rough idea of how accurate this is. The value of T, that is the ratio of R to its standard error or R, came out to be 104.8, of which the probability of its occurring by chance, on the basis of any probability table is so close to zero that it simply means certainly that this is the real relationship.

The same conclusions are obtained from the Z test, which I started to give you to start with, where the value of Z was 3.86.

[fol. 96] Q. I thought you said 3.876.

A. Yes, I did. The ratio of Z to the standard error of Z is 16.9 for nineteen observations, is still so small its probability of occurring by chance, you would have to accept the fact that this is reliable.

Q. What was your last figure?

A. 16.9, the ratio of Z to its standard error.

Q. All right. Now, would you give me the same figures, if you have them available, for the original form of Chart III-A. Did you make a similar test for that?

A. I don't think I ran the test on that because I knew from experience that this scatter diagram was so small it did not require for my particular purposes originally to have to run it.

I did this later because I figured on depositions you would probably ask me this question, but for my original purposes I did not need it, in my judgment.

Q. Mr. Woolley, are any of these tests - —

A. Pardon me; I might complete this thing by taking the chain stores. Now, the chain stores over in Chart III-B you notice have a little wider scatter diagram, I mean, the dots are further apart, as compared to independents. It would look to be less reliable as such.

[fol. 97] All right. The correlation coefficient for the chain store relationship is .994. The T test came out to be 35.4, which still is so large as not to be due to chance, so the relationship even of that scatter diagram is significant.

Then the Z test came out to be the ratio of Z to Sigma Z, and is 9.8 or 9.76.

Q. 9.76?

A. Yes, and that T test with the Z value is so large as to be beyond the realm of the probabilty of such a large value occurring by chance and, therefore, the relationship is to be considered real.

Q. What is the figure?

A. Well, it is less than six-ten millionths chance of occurring by chance.

Q. Let me be sure I have got comparable figures. The correlation coefficient for III-A is .99914?

A. Check.

Q. And for III-B it is .9914?

A. Check.

Q. The T value for III-A is 104.8?

A. Yes.

Q. And for III-B is 35.4?

A. Check.

[fol. 98] Q. The value of Z for III-A is 3.87?

A. Yes.

Q. And for III-B, 9.76?

A. No, I did not give you the value of Z: 2.94.

Q. 2.94?

A. I carried it out to five places, but you just don't need more than two decimal places. And the ratio of Z to itself —is it?

A. No, to its standard error.

Q. In III-A it is 16.9 and in III-B it is 9.76?

A. Right, or if you want to carry the other one out, it is 16.89.

Q. All right, just to put all these things in somewhat more simple terms, you did find that III-A was a more accurate presentation—or you correct my language if it isn't the right terminology, but it was a better picture than the III-B in mathematical terms?

A. Not significantly different, no.

Q. Well ——

A. These tests that I have just given you on reliability are testing for the probability that this relationship from these data actually did occur or did not occur from chance. In other words, if you drew another sample, you may or

[fol. 99] may not get the same relationship. This is the probability that if you drew another sample you would get that relationship.

Or, put it the other way around: This correlation coefficient is significantly different from zero, which means that it is real and does exist and is all the magnitude indicated.

That is all these tests declare, that this relationship does exist and is of the form indicated.

Q. Well, now, just ——

A. Just because there is a minor difference between the correlation coefficient between the chain stores and the independent store case of, oh, 005 or .005 per cent—no, not per cent—is really meaningless, really. I would not draw that conclusion necessarily.

Q. You say the difference in these answers is not significant, they are both sufficiently accurate to be relied upon?

A. That is right, they are both sufficiently accurate within themselves to be acceptable.

Q. Well, now, just so we understand, the direction which tends to give more favorable answers, I understand your position is that both answers are favorable, but I take it that .99914 is more favorable than the .994 answer?

[fol. 100] A. Only in a minor way.

Q. But it is in the direction of being more favorable?

A. It is in that direction, yes.

Q. And the 104.8 answer is in the direction of being more favorable than the 35.4 answer?

A. But both are favorable.

Q. What answer with respect to the T figure would be sufficient to be favorable? What figure would have given you cause to be concerned that it was not a satisfactory test?

A. Oh, if the probability that T exists was less than—I used the value of less than two per cent, I mean, greater than two per cent. Excuse me.

Q. Greater than two per cent? How would that be expressed in figures which are comparable to 104.8?

A. That is difficult to say because you have a matrix table here which you have got to take into account. For this particular size of sample, which is twenty observations here, minus one degree of freedom, nineteen, you would [fol. 101] have—I don't recall what the exact figures are,

I would have to look it up in the book in the table; but it would be down around the neighborhood of 2 to 1 ratio.

Q. 2 to 1 ratio?

A. Yes. You see, T represents the ratio of R to its standard error.

Q. In other words, that 35.4 is a 35 to 4 ratio?

A. 35 to 1 ratio.

Q. Oh, 35 to 1 ratio? The T 104.8 is a 104 to 1 ratio?

A. That is right.

Q. And you said as long as it is above a 2 to 1 ratio you would be satisfied?

A. Yes. It would depend upon the number of degrees of freedom, in other words, the size of your sample. That really governs it, mainly, and the probability level you want to select as your dividing line.

Mr. Jinkinson: Off the record.

(Discussion had off the record.)

Mr. Stevens: Go back on the record.

By Mr. Stevens:

Q. Can you tell me with respect to the value of Z, what [fol. 102] the minimum value that would have been satisfactory to you would have been?

A. You mean the ratio of Z to its standard error? You see, Z is merely a means of converting R, the value of R, into another figure, which is more normally distributed. When you get into measurements of correlation coefficients with respect to small samples you get an askewed distribution and the reliability tests, the T test is not really applicable for small sampling of R.

Q. So this value of Z to 3.876 is not itself a test, it is merely a step to making subsequent tests of the ratio?

A. So you can use normal probability. Incidentally, that it why you get a lower value of the ratio of Z to its standard error as compared to the ratio you got when you compared R to its standard error. The difference is in the degree of askewance as it has affected the value of the tests for R, as compared to the normal tests for Z. It is still significant.

Q. What figure is comparable to the figure of 16.9, which you have for the ratio of——

A. I could not answer that. I would have to look it up.
[fol. 103] Q. Do you have any rough approximation?

A. At the moment I could not give you any answer. I would not try it. It is much smaller than this, I mean, it is at least one-tenth of that.

Q. Then if it had been that much smaller, it still would have satisfied you that the data had the significance which you attach to it?

A. Yes. In other words, these levels are so far beyond what would be the dividing line between acceptance and non-acceptance that you just have to accept them, or at least I do as statistician.

Q. Now, my next questions are about the exponents in either III-A or III-B?

A. Yes.

Q. I take it that there could be some modification of that exponent which would still permit your line to meet and satisfy the various tests which you applied to it?

A. Oh, yes, that exponent is subject to a standard error, too, because all those constants in those equations are derived from the basic data and any variation in the basic data in existence will also be reflected in the constants of the equation.

[fol. 104] Q. Now, do you have any notion of what degree of fluctuation you would find permissible in the exponent?

A. No. I did not work that out, but it could be done.

Q. Do you have any even approximate notion of what it might be?

A. Oh, let's see. On the basis of these figures it would probably be down around—I am just guessing now, an educated guess, so to speak—well, the value is .92 in round numbers.

On the basis of this degree of significance found in the correlation, I would expect the standard error of that value of .92 to be within one per cent or maybe two per cent. One or two per cent or not more than five per cent of that figure.

Q. Not more than five per cent of .92?

A. That is right.

Q. May I express it this way for simplicity: If we assume that the figure were 100, 1.00, that it would be not more than 1.05 to 95?

A. That is right, point nine five.

Q. But you might find that degree of variation in the exponent and still have the equation fit your tests of accuracy which you have described?

A. That degree of variation would not change the slope [fol. 105] significantly.

Q. It would not change the slope——

A. It would change it, of course.

Q. But to a very trifling degree?

A. Very slight.

Q. Now, in your original calculation of—let's take Chart III-B, for example. You did make a change of just about that amount, did you not? You changed the exponent from 1.09, with some additional numbers, down to about 1.04, and so forth?

In other words, you did make the degree of change you have already indicated?

A. Now, we are talking about two different things here.

Q. Well, aren't we talking about a change in the exponent?

A. You asked me about what the change might be. I assume you meant chance which was measured by the standard error.

Q. Oh.

A. In other words, if you took another sample of similar size, you would expect within five per cent to come up with a similar value of that, plus or minus. The kind of change you are talking about now is due to a bias which is not within that reach of the sampling here. That is entirely a [fol. 106] different thing. That is due to error of calculation or error of judgment, or whatever you may call it.

Q. In other words, in your original calculations, there were some things which required reexamination about the data and your sampling which caused a change in your conclusion of about five per cent of the exponent?

A. But that is not due to sampling.

Q. I understand.

A. That happened to fall within the sampling range or area, yes. It just happened. It might have been large or it might have been small.

Q. So that that particular change in the sample happened to cause that particular amount of change in the exponent? What you are saying, if I understand what you are now

saying, is just as a matter of chance in a purely random selection out of a very large sample you might find that much variation in the exponent?

A. It is possible. It may be five per cent. It probably would be less than that: I mean, that is an outside figure, just on the basis of this data on there.

Q. Well, now, isn't the effect which these charts and all the calculations derived from these charts have on your [fol. 107] cost study produced entirely by the fact that there is a slight difference in the slope of the line on III-A from that on line III-B?

A. Entirely?

Q. Yes.

A. No. That is only part of it.

Q. Well, from the fact that there is a slight difference in the slope and also that the slope of the line on III-B tends to go up at a higher rate than the slope of line——

A. Well, that is the reason for the slope; I mean, the slope causes that.

Q. But the fact there is a difference in slope together with the direction of the difference in slope is what produces the cost effect which you have described in prior charts?

A. You mean the cost difference between the chains and independents?

Q. No, produces——

A. Oh. It governs the estimate of the number of cases and the number of glass containers upon which it is based, yes.

Q. Well, let me put it this way: If the two lines were [fol. 108] parallel?

A. Then you would have a constant difference.

Q. Then you would have a constant difference and there would be no——

A. Constant ratio difference.

Q. Then the use of the lines would not have tended to produce a cost difference in high volume which is advantageous to the independents, which your figures now tend to prove?

A. If you were to take and superimpose these two charts, keeping in mind the scales in proper relation to each other, you would find that the relationship of chains—this rela-

tionship for the chains crosses the independent's relationship at a around, I think, five or six hundred or maybe eight hundred units.

Q. Wouldn't you find it would cross about two hundred fifty? Bear in mind you would use a different scale on III-A from III-B.

A. No, it is the same scale but different position.

Q. I mean, a different quadrant, or whatever you call it.

A. A different position.

Q. Position.

[fol. 109] A. The same scale. Let's see, I did this once. It is difficult.

Q. Can't you find it by looking at Table—what is it, 13?

A. Well, we might do it that way.

Q. Or wouldn't Table 14 show it?

A. One hundred units of points delivered to an independent would produce about seventy containers—would be delivered in seventy containers. Now, for a chain, a hundred units would be around fifty. So it is greater than that.

Q. May I suggest you look at Table 14 and look at the number of all containers for independents shown in Column 2 and the number of all containers for chains shown in Column 4. Wouldn't the approximate place where those numbers tend to become the same be the place the lines cross?

A. It is around one hundred seventy something.

Q. Well, now, it is about two hundred fifty, isn't it? You have 157.34 for independents and 157.35 for chains.

A. Oh, yes, you are right.

Q. So that the lines would cross at about two hundred fifty points?

[fol. 110] A. That is right.

Q. Now, do you have any notion of how much data you have for independents over the point where the lines cross, namely, about two fifty, or about how many dots are there on Chart III-A over that point?

A. Two observations or one observation. Two classes, put it that way.

Q. Then how many dots do you have on the Chart III-B dealing with independents below the point where the

lines cross—dealing with chains, excuse me, below the point where the lines cross?

A. Twelve observations over two hundred there,—rather, I mean, sixteen observations over two hundred.

Q. Well, let's take below the two hundred there.

A. Below two hundred for the chains?

Q. Four observations there, aren't there?

A. Eight observations.

Q. Eight observations below two fifty?

A. Eight stores upon which the data are based.

Q. Eight stores below two fifty?

A. Eight chain stores.

Q. Eight chain stores, and they are represented by five dots on the chart, are they not?

[fol. 111] A. Yes.

Q. And the three at the extreme left lower end of the line on Chart III-B each represents an individual store, do they not? Is that correct?

A. Yes, sir.

Q. And is it not correct, Mr. Woolley, that if those three dots were not on the chart that the slope of the line would be different?

A. Oh, sure, if you remove any of those dots it would change.

Q. Do you know this to a mathematical certainty that if you took those three dots off, or moved them, the slope of the line would change?

A. Well, sure, because I took those into account in drawing it.

Q. And you gave each of those——

A. That is true of any observation.

Q. You gave each of those dots the same significance as each of the other dots which are portrayed in Chart III-B in drawing that line, didn't you?

A. Certainly, because as far as I am aware, those are the only stores you have down there in the chain category and, therefore, they had to because they represent the popula-

[fol. 112] tion. They are not a sample.

Q. So is it not true, Mr. Woolley, that for the purpose of predicting the number of containers the chain stores would use when they are taking, say, over twelve hundred points per day, that your conclusion on that subject is

determined in part by what happened in those three individual cases which are shown in the left-hand side?

A. No, not for the higher classes, no. That only governs the lower end of the scale.

Q. But if it governs the direction of the line, it necessarily governs your conclusions at all volume levels, does it not?

A. Well, naturally, all the data taken together governs the direction of that line; not any one set.

Q. And if those three stores—It is therefore correct that those three stores are influenced——

A. Wait a minute, now. Let me get myself oriented. You are talking about on Chart III-B?

Q. III-B.

A. Those three lowest points, right?

Q. Right.

A. All right. Remove those and I would not change the [fol. 113] line at all.

Q. Well, Mr. Woolley, you know to a mathematical certainty that the line would be changed if you removed those, don't you?

A. No, not necessarily, because, look, if you removed these three lines—just ignore them—it would change it only slightly. It might change the slope slightly.

Q. How much might it change it in terms of the exponent to V?

A. I don't know.

Q. Might it change it as much as five per cent?

A. I don't know. I have not done it. I would have to recalculate it.

Q. But it is clear, is it not, Mr. Woolley, that removing those points would tend to raise the level of the line at the left portion of the chart and lower the level of the line in the right-hand portion of the chart?

A. It might have that effect. I don't know how much.

Q. Well, if it produced any change it would produce that change in that direction?

A. Oh, sure, it is possible. It might do that. It probably would.

Q. Well, I mean, it definitely would, wouldn't it?

[fol. 114] A. It probably would. I don't know. I would have to check it out to see.

Q. Well——

A. I would not say definitely it would. It might even shift the curve up or it might even rotate it in the other direction. It is more likely to change in the direction that you have indicated.

Q. Well, the answer to this question can be determined by arithmetic calculation, can it not?

A. It can be determined by an arithmetic calculation, but in view of the fact that three stores are part of your population, I would not do it.

Q. I understand that, but these three stores had an effect?

A. Oh, of course, all the observations have an effect upon that line. Remove the upper four of them and you probably would get a different line, too. Remove the middle four, one, two, three, four middle top ones there. Take any set of combinations of those four points you want and you will change the slope of the line or change the position of it, one or the other.

Q. Now, it is correct, is it not, Mr. Woolley, that in your study you came to the conclusion that at certain very high [fol. 115] volume levels it would be more expensive to serve a chain store than it would to serve an independent store?

A. On the basis of this data, yes—these data, I should say.

Q. And isn't the principal factor which led you to that conclusion the fact that the line which is portrayed in Chart III-B has a slightly higher slope as it goes up than the line which is portrayed in Chart III-A?

A. Yes.

Q. That is the principal factor in the development of the data which led you to the conclusion it would be more expensive to serve a chain store than an independent of comparable size at a certain high volume level?

A That is right. That is the principal source of the change in direction.

Q. And that is because the way you have plotted the lines or the conclusions your data led you to cause the lines to cross and become farther and farther apart as they came to higher volume?

A. It is the nature of the data involved here. That is [fol. 116] the way the data itself shows up.

Q. Now, that conclusion would not have followed if the two lines had been parallel?

A. No.

Q. Now, if——

A. I mean, I agree with you.

Q. That it would not have followed if the lines had been parallel?

A. That is right.

Q. Now, if the exponent in Chart III-A had been one rather than .986, and so forth, and if the exponent on Chart III-B had been one rather than 1.04, and so forth, then the lines would have been parallel, would they not?

A. Yes.

Q. So the entire basis of this development as to it being cheaper to serve an independent at higher volume level than a chain——

A. From this source.

Q. (Continuing) ——from this source is based on the fact that there is this deviation from the exponent one in Chart III-B and the deviation in the other direction from the exponent one in Chart III-A?

[fol. 117] A. That is right.

Q. And if a correction of the exponent by less than five per cent had been made in each case, you might have had both of the exponents as one?

A. No.

Q. The direction of five per cent in III-A?

A. III-A, will not produce one.

Q. You add five to ninety-eight and you get one hundred three.

A. Ninety-eight? Ninety-one.

Q. You are looking at a different one than I. Oh, pardon me, you are correct. You would have to add eight per cent.

A. You would have to add more than your standard error in order to do it.

Q. You would have to add eight per cent?

A. You would have to have a different sample or a different reason for changing the data.

Q. But an error of eight per cent in the exponent on Chart III-A and an error of 4⅓ per cent in the exponent of the Chart III-B——

A. Your standard error would not be subject to that much error from these data.

[fol. 118] Q. I think you indicated earlier that by merely the random sampling you might find as much as five per cent?

A. I said five per cent. Now, you take five per cent of 92, and that is only four-tenths of one—that is only .004, not eight. You don't understand what I mean by percentage.

Take this figure, take five per cent of that figure as the standard, then add it to it. That would be your maximum range.

Q. Well, five per cent of——

A. Of 92 is .004.

Q. .045?

A. No—oh, wait a minte. Five per cent.

Q. Well, let me ask you this.

A. You are right; you are right. All right, the maximum you would get would be 96 on this basis.

Q. So you would acknowledge it might be as high as .96 merely by the random sample, whereas, Chart III-B might be as low as .99 by the random sample?

A. No, no, no; 1.04.

Q. 1.04 is what it is after revision.

A. No, 1.04 is what it is now.

[fol. 119] Q. Right.

A. Wait a minute. Which is which?

Q. See, you originally had on III-B an exponent of 1.09 which, due to changes in the data, was reduced to 1.04.

A. I have got both here. All right, I am with you now.

Q. Well, a little simpler——

A. You still get a deviation as far as that is concerned.

Q. Putting it in simpler terms, if the exponent were one, you would really have nothing more than a simple average, would you? If the exponent were one, you could take your entire volume and divide it by your number of instances?

A. No, you could not, no, because this is a lo*th*arithmic relationship and if you plot this information on regular rectangular scales, you would get a curve in one case like this and in the other case like that. (indicating) That is, if they are parallel.

Oh, now, wait a minute——

Q. Take your time.

A. Let me think. You still have the constant terms to [fol. 120] deal with. Let's look at Chart III-A. If the slope were unity then the number of cases would be two per cent greater than the number of points.

Q. That is the——

A. If the slope were unity. The other would be ninety-nine hundredths. In other words, you would take the volume and multiply by .986 and you would get the number of containers from those two equations.

Q. Well, that is if the number .986 is assumed for the first value.

A. That is not the same thing as striking an everage by any means.

Q. Well, now, let me just find out if we did strike an average. Now, if you struck an average of your independent data, I take it the first thing you would do is to take the total number of containers for the independents, and I think that figure is shown on Table——

Mr. Stevens: Off record, please.

(Discussion was had off the record.)

By Mr. Stevens:

Q. Is it not true that Table 13-a does show that the total number of containers for independents studied in your [fol. 121] sample was thirty-eight thousand, eight hundred —excuse me, 32,838.

A. Right.

Q. And then the total number of containers in which those points were sold to the independents studied in your sample is shown on Table 12-a.

A. That thirty-two thousand is the number of containers.

Q. Oh, that is the number of containers? But the number of points—excuse me—the number of points shown on 12-a is 47,283.2.

A. Yes.

Q. Now, to take a simple average, you would divide one of those figures by the other, would you not?

A. In terms of ratio, yes, to get a given average ratio, yes. That is what this constants term represents.

Q. And an average ratio in this case, according to Mr.

Havemeyer's figures, would be .694; in other words, for every hundred points sold independents, 69.4 containers? For each hundred points it would be 69.4?

(Discussion had off the record.)

By Mr. Stevens:

Q. So to get the ratio for independents, we divide the figure 32,838 by 47,283.2, the former being the number of [fol. 122] containers and the latter being the number of points?

A. That is the average ratio.

Q. We come up with an average ratio of .694 for independents?

A. Yes, but that is not the same thing, assuming this is unity. That would not be the same thing.

Q. If you then sought to portray that average on a chart similar to Chart III-A by means of a formula similar to the one you used, is it not correct that the fomula would be, substituting in your equation, N_i equals .694 times V_i to the first power?

A. Sure, if B comes out to be unity, yes.

Q. Then that could be plotted——

A. Now, remember that both of these constants in these equations are derived from the same set of data and they are dependent upon one another. The only time B will be equal to that is when B happens to come out to be unity. If B is not unity, then this constant term in here is different from what this average will be.

Q. Now, in other words,——

A. The only time my constant in this equation here and your constant is when B is equal to one.

[fol. 123] Q. If it is equal to one then the first figure would be the one I described?

A. That is right.

Q. Now, similarly, for chains we could use the same data which you used and the same figures from Charts XII-B and XIII-B, and I will just run through it subject to your verification later—we would take the total number of containers for chains, 21,813.5, divide that by the total number of points per chain, 33,31.4, and according to Mr. Havemeyer's calculation, get a ratio of .65.

Then if we assumed unity as the exponent in the formula and substituted that data for the formula on IXI-B, and subject to the reservations you have made, the formula would then be on III-B, N. equals .66 times V. to the exponent one?

A. That is right.

Q. Now, it would be possible, would it not, Mr. Woolley, to use those formula and plot lines on charts on which you had placed exactly the same dots which you placed on your Charts III-A and III-B?

A. But they would not fit the data.

Q. Then after you plotted them it would be possible to [fol. 124] make the same kind of correlation tests which you made to determine whether or not they were within the degree of tolerance which you find to be required?

A. That is right.

Q. Now, subject to your review at——

A. I think you would find that it would be quite different in terms of degree of reliability than what we have here. It would not fit the data in the statistical sense. I am just forecasting that, but I believe that would be the case.

Q. I want to show you a chart which Mr. Havemeyer made, which I have marked with a red pencil "A" and I have crossed out the title he gave us because I do not think it is applicable. This is his attempt to draw the lines in the manner in which we have been discussing it.

I will ask you what your reaction is to that?

(indicating.)

A. In other words, you have combined the chains and independents together?

Q. I don't believe so.

A. And drawn your chart accordingly?

Q. He put them both on the same chart.

A. That is unfortunate.

[fol. 125] Q. One of the lines represents the chain line——

A. Just what I thought would happen, too.

Mr. Havemeyer: The scale is matched, by the way.

By the Witness:

A. The difficulty with this is, I would say this is not a good fit, even by looking at it without running any statis-

tical tests, because down here below you have all your independents above the line, above fifty units, well, except the class; all your independents are below the line roughly, and the disparity gets larger and larger and larger the larger you get.

So that would be a very poor fit for these data. The same is not quite true for the chain stores, but that is to be expected, because their computation is so close to unity, anyway.

Q. Well, isn't it true, Mr. Woolley——

A. I would not accept the independents, that as a good fit for the independents.

Q. Isn't it true that the extent to which your charts have significance is dependent upon the extent to which they are more accurate than this particular calculation?

A. Surely. That is the problem any statistician has—[fol. 126] judging from what has been used.

Q. Isn't is true that your doubts about the validity of Mr. Havemeyer's presentation are dependent primarily on the fact that it appears to you that independent stores in the volume ranges below fifty units per store appear to you to use a larger proportion of containers than this chart indicates?

A. Yes. It overstates the actual situation, or whichever way it is. The actual situation is greater than what your estimates would show. The purpose of fitting curves to data is to measure an underlying relationship if it exists in such a way that your residuals from that estimated line or expected values will be randomly distributed about that line, so that if you have any equation which you are fitting to data which have concentrations of data in one area of the line above or below, in other words, you get what we call bias in the fit.

When you get below a certain level you get all those above, and above a certain level you get all those below it. That is not a good fit of the data at all, because you are not normally distributing. You have got a bias in there and deviations.

[fol. 127] In the first place, your deviations will be too large. Your standard error would be too large, which would destroy the reliability of your line.

Q. Well, isn't it true that the difference between your

chart, insofar as it portrays independents, and Mr. Havemeyer's chart is primarily caused by the location of the points for the small independents, namely, those below fifty?

A. Yes, because I am using the least squares method of estimating this equation which normalizes the deviations about that line. It fits the line to the data in such a way the deviations would be normally distributed, with minimum variation.

Q. And if those——

A. This is the only line with which with that data you could fit mathematically that would minimize and give you the smallest variation about that line. Any other line you fit for that line with that data would give you a large deviation automatically.

Q. If those lower volume independent stores were omitted, is it not true that your chain line and your independent line would tend to be more nearly parallel?

A. On the independents? Not on the independents it [fol. 128] wouldn't. Are you talking about the chains only?

A. No, there are no chains below that. If the data for small stores, stores under fifty points a day, were just omitted entirely from your study so that you merely compared chains of over a volume of fifty with independents of over a volume of fifty——

A. If you take a partial sample you could get any results you wanted.

Q. Well, I am not asking that, but wouldn't the effect of that be on your study to make the lines more nearly parallel?

A. Probably. I don't know.

Q. And to reduce the amount of differential between the chains and independents at the higher volume level?

A. If it had that effect, yes, of course, the result would follow.

Q. Now, have you in your study of the milk industry, apart from the calculations you have made, found any reason to believe that a large independent store will more nearly resemble a small independent store insofar as the proportion of containers to points it uses than it would resemble a large chain store?

A. All I can say is from what I have seen from this data [fol. 129] is that there is a difference in relationship of the number of containers that you draw from the same volume delivered in terms of points.

Q. You feel that on the basis of the calculations——

A. I assume that this data represents an adequate sample of a representative dairy in the industry.

Q. Do you feel that on the basis of the data which you have compiled that you could predict the number of containers which an independent store would take if a new independent opened and it did a volume of business of fifteen hundred points?

A. I think that on the basis of this data alone I would be willing to use it as a basis of estimation, yes.

Q. And you could do so for chains as well?

A. Probably, until some other information came along to change the relationship, which means another sample, another study.

Q. Well, to what degree could you in your own judgment properly extrapolate from your own line?

A. You mean with the reliability we have involved here?

Q. Yes.

A. Surely. That is the reason why I would use it, be- [fol. 130] cause it is such a high degree of reliability that it enhances the probability of extension beyond the actual observations.

Q. My question is to what volume level would you be willing to extrapolate from these lines in order to think we have justifiable——

A. I have taken it up to the thousands here, and that is as far as I would care to go. For this purpose that is all you need to go to.

Q. You would go to a thousand for independents?

A. I think so.

Q. And why would you stop at a thousand?

A. Well, it is just an arbitrary stoppage point.

Q. It is necessary, is it not, to make some exercise of judgment as to what point your figures may be relied on?

A. You could not go up to a million, but within the reach of your data a thousand is not too far in the terms of the whole range of data that exists.

Q. Do you think it is good statistical treatment to go up

to a figure which is higher than any figure which you find in the data which you have actually used?

A. Yes, if the probability of the data itself is sufficiently [fol. 131] justified. That is done every day.

Q. Now, isn't it the real question in determining the significance of these charts whether or not your judgment is sound that the deviation from the exponent one in each case actually exists? Isn't that the real question?

A. Yes.

Q. And that is a question which you have not answered by the various tests you have employed here?

A. I can answer it if you wish me to. I did not think it necessary for my purposes because I am satisfied with the general appearance of the data and the results I found in the statistical significance and degree of correlation we get here, that I know from working from these formulas heretofore that with that high a degree of reliability and high a degree of correlation—because the standard error of that parameter is a function of that correlation it would be very small.

I am satisfied even if I did calculate it, it would probably be less than five per cent.

Q. Of course, you only have to change one of them to five per cent and you would get an exponent of unity.

[fol. 132] A. Well, one of them, but the other one isn't. That is still enough to give a significant deviation at those levels, if that is what you are worried about. I mean, from the independents you won't be able to lower—well, no, you would not even get up to one, either.

Five per cent on top of that is .96, and that is a lot different from one when you are dealing with this range of data.

Q. Of course, it is possible, though, is it not, that the change of only a handful of stores might produce that much of a change in the exponent?

A. It is possible. Anything is possible.

Q. And it is also correct, is it not, that with respect to Chart III-B if we eliminate the three smallest chain stores in the sample we would tend to make the lines more parallel at high levels, and if we eliminated the small independent stores below fifty points per day on Chart III-A, we would again tend to make the lines more parallel?

A. It is possible, but you would have to have a justifiable reason for doing so.

Q. So that the deviation of the lines at high volume [fol. 133] levels is significantly influenced by what you found at the low volume levels?

A. I would not say significantly, no, because I don't know how much they were changed. I just say they would affect it, yes, but would not necessarily say significantly.

Q. Did you make any tests to determine whether there is a difference in the relationship between points and containers in low volume independent stores than there is in high volume stores?

A. That is shown here on this chart.

Q. What is shown here?

A. These charts. These two charts show it. They show the effect of volume on that relationship.

Q. Do they show that the low volume independents tend to use a relatively larger number of containers than a high volume independent?

A. Well, let's see. The independents take this unit class down here, ten units. You get a half a container. That is five hundredths of a container per unit or half a container per ten units. A thousand units, you get 8 10ths of a container per hundred units. It shows the difference.

[fol. 134] Q. Now, Mr. Woolley——

A. I mean, that is what these two charts are reflecting, is those differences that do exist in the actual data.

Q. Now, if Mr. Havemeyer's calculation is found to be acceptable, would that not reflect an element of saving in costs of serving chains as contrasted with the cost of serving independents which has not been reflected in the Bowman study?

A. No, I would not say that.

Q. I mean, if you accepted the curve as he plotted it—I understand you have objected to it——

A. My understanding is in his cost study for January, at least, he has reflected on an average basis the differential percentage discount on the percentage of fiber glass versus glass containers; fiber versus glass.

Q. Mr. Woolley, I am merely talking about the relationship between number of containers and number of points independently of the glass-fiber problem.

A. Oh, excuse me.

Q. Isn't it true if the simple ratio of exponent of one were an acceptable method of studying this data, that chains use relatively fewer containers than independents?

[fol. 135] A. Yes.

Q. His figures would indicate that?

A. Would indicate that.

Q. But that is not something which the Bowman cost study tried to take advantage of?

A. Oh, that particular feature?

Q. That particular feature?

A. This particular source of difference is not reflected?

Q. Right.

A. I see. But I think the effect of fiber and glass is the same.

Q. I understand that, but as to the container—point problem, this is in effect a refinement beyond anything which is done in the data presented, and if your refinement of it is a correct analysis of it, it tends to minimize the cost differences in higher levels, whereas, if Mr. Havemeyer's analysis of it is correct, or at least the way it is described on the chart, it would tend to justify an even greater differential?

A. It would add something to it.

Q. It would add something to it.

A. Well, I am not so sure about that because the way [fol. 136] he calculated it, if I understand your fiber-glass ratio the way you incorporated it into these number of containers, that average figure you are reflecting there is reflecting that average difference right there. I think it is because—look, this is only one step and the total difference resulting from the two type containers, take these two schedules and multiply it by those percentages we have been talking about on Chart IV, you come out with a net figure.

Now, his, when you take an average percentage of glass containers, this difference that we are talking about between containers is already reflected in your average, I am pretty sure, because you used actual data to determine it.

Q. Well, now, actually on any of these charts—let's stay with Charts III-A and III-B for a moment; the points, unless only one store is involved, and in most of the most of the points there is more than one store involved—the

point is really an expression of the method of summarizing more than one point, isn't it?

A. The effects of more than one point.

Q. Now, are there other methods of summarizing data for calculations of this kind other than summarizing them [fol. 137] in points and plotting the points?

A. I suppose there are a variety of ways you could do it.

Q. Well, didn't you describe one such method in an article which you wrote and referred to in the proposed rebuttal material?

A. Well, that is a different approach to this problem, yes.

Q. Is that a more accurate approach than the approach which you adopted here?

A. It might be.

Q. Did you employ it at any stage of your work here?

A. No, sir.

Q. But, I take it, it might have produced a higher degree of accuracy on these various charts than the accuracy which you did attain?

A. Well, I am not sure about that, because I have not run those kinds of tests on that other theory. Incidentially, that other theory is only applicable to a straight line relationship, anyway.

Q. Well, when you talk——

A. It might be applicable to these two charts here, but——

[fol. 138] Q. It might be applicable to III-A and III-B?

A. It might be.

Q. Might it be applicable to Chart I?

A. No—well, yes, on an alternate basis, possibly.

Q. Did you plot Chart I on a logarithmic scale?

A. A double logarithmic scale?

Q. Yes.

A. Yes.

Q. Do you have available the work sheet that you used in plotting it on a double logarithmic scale and, if so, may we be permitted to look at it?

A. Let me look for it.

Mr. Stevens: We might as well just take a short recess at this point, then.

(A short recess taken)

By Mr. Stevens:

Q. When you plotted the data that is portrayed in Chart I-A on a logarithmic scale, what was the shape of the line?

A. Straight.

Q. Higher at the left and lower at the right?

A. Declining straight line.

Q. A declining straight line?

[fol. 139] A. Yes, just the opposite from the ones we have been dealing with here.

Q. Now, the dots which you used for the purpose of plotting and eventually drawing the line are drawn from the portion of the data which pertains to customer service time given to customers on the occasions when they took customer service, is it not?

A. Yes.

Q. And it does not include any time spent—excuse me, it isn't time spent, but you excluded from your calculations the points delivered to customers on occasions when they did not take customer service?

A. That is right.

Q. Now, in adopting this approach, did you assume that there was a difference in the cost of rendering customer service between these two examples, which might illustrate my point:

Assume in one instance that a customer is given fifteen minutes of customer service every Friday and he gets five deliveries a week, and in another instance, a customer receives three minutes of customer service on each of five consecutive deliveries.

A. This is on a per day basis?

[fol. 140] Q. On a per day basis, and assuming the same volume of points delivered to each.

A. Per day?

Q. Per day.

A. This reflects the volume delivered per day per customer?

Q. Right. Assume, let's say, each of them receives ten points per day.

A. All right.

Q. Fifty points for five deliveries. In one instance a customer receives fifteen minutes of customer service.

A. Per day.

Q. On the fifth day and none during the first four days. In the other instance, the customer receives three minutes of customer service every day.

Now, in your judgment, is there a difference in the cost of serving those two customers?

A. For those specific customers there would be, yes.

Q. And the answer is there would be a difference in cost?

A. Yes, if that difference in time per unit is reflected in your cost study, there would be, yes, fifteen for five against three for five, unless I misunderstood you.

[fol. 141] Q. No, I think I better state the example over again.

A. All right.

Q. Let's assume——

A. Keep it on a per day basis and it will make more sense to me.

Q. Well, on a per day basis they each receive three minutes of customer service per day, but the manner of giving the customer service to one is that the three minutes is in fact given every day, but with respect to the other, the manner of giving it is that every fifth day fifteen minutes of service is given and no service is given the other four days.

A. I think it is figured on the time he actually receives the service.

Mr. Stevens: Would the reporter read me the answer, please?

(Answer read by the reporter.)

By the witness:

A. (Continuing) It is chargeable at the time he receives the service, otherwise it is not chargeable.

By Mr. Stevens:

Q. My question is whether you have assumed that there [fol. 142] is a difference in the costs of serving those two hypothetical customers?

A. Not at the time they are receiving the customer service. At the time one does not receive the customer

service and the other does, yes, but not when they both receive it.

Q. I mean, over a long period of time. Say this is a pattern that can be established by a sufficient amount of data to say that this is what really happened, that one man gets three minutes of customer service every day and the next man buying at the same volume level gets fifteen minutes of customer service every fifth day, and no customer service on the other four days.

I want to know whether——

A. Well, on the day he did receive the customer service, of course it is more costly because he spent fifteen minutes there.

Mr. Long: I assume this is purely a hypothetical question unrelated to any part of the Bowman cost study.

By the witness:

A. (Continuing) It is obvious if it only takes three minutes to perform a given amount of service to a given [fol. 143] customer, and on another day he spends some other service or more service, obviously he would have to render more service to the customer to get fifteen minutes on that one day he did receive customer service than he did the other customer who only receives three minutes a day.

Mr. Long: I think the record should show that as far as the Government is concerned, Mr. Woolley's answer on this is going for his credibility and his expertiese, then I think the answer is probably all right, but if it is developing something that the Government does not know about Bowman's cost study, I think the record ought to show this is something outside the record.

Mr. Stevens: I will explain the purpose of the questioning is to understand the method by which Mr. Woolley made the calculations reflected in Table 10-A and Chart I-A. I think you understand what I am interested in obtaining.

By the Witness:

A. (Continuing) You had a set of customer services [fol. 144] which are to be performed, and the frequency

is immaterial for this purpose, at a given store or set of stores. This table and the chart reflects that when they do receive this service, this amount of time that is spent with respect to the different sizes of stores involved, that if a store of a given size does receive this compact amount of service which is rigidly defined here, I assume, then at that level of volume that is the average rate of time that it takes to perform that service for that level of volume at that store.

By Mr. Stevens:

Q. On the occasion when he gets customer service?

A. When he gets it.

Q. But now——

A. The fact he does not receive it at another time is irrelevant to the question of measuring the amount of time it takes the driver to perform that service at that store when he performs it.

Q. Mr. Woolley, I am not trying to debate or disagree with you, but——

A. That is why I merely say I have eliminated all stores who do not receive customer service.

[fol. 145] Q. Well, is it not correct then that you have in effect made the assumption in the method by which you used the data on Table A and plotted the dots on—that is, Table 10-A, and plotted the dots on Chart 1-A, that there is a difference in the cost of serving a man who takes fifteen minutes of service every fifth day and the cost of serving a man who takes three minutes of service every day?

Your position is there is a difference in cost in serving those two customers?

A. Oh, sure. That is true there is a difference in the amount of service performed; otherwise they would take it at the same time. Frankly, I think your example is a very poorly constructed one because it does not represent the basic assumption here.

The basic assumption is the driver is going to perform the same kind of service to both classes of stores, and if that be the case, how can he spend more time with one than the other, other than the question of volume? I don't see the validity of your analogy.

Q. But, in any event, you did—just so we are clear on this—you did assume in your development that there was a difference in costs between those two situations?

[fol. 146] A. Well, I did not have those particular situations in mind when I did this.

Q. But if those two examples had been before you, they would have been treated differently in the method by which you used the data?

A. If they were the same—if they received the same service for the same size of store, then they would be averaged together if their time of performance was different; yes.

Q. Well, now,——

A. I assume that there are variations in the time to perform this bulk or package of customer services, so-called. I assume in the performance of that service at any given store at any given time, the driver may take five minutes at one store and at another store ten minutes, and so forth.

Now, we are here developing what the average is, not what it is at any specific store necessarily. We are using a sample here to develop an average pattern for stores of similar size to see what the effect of that size is upon the amount of time it takes per point delivered to perform that service. That is what this chart demonstrates.

[fol. 147] Q. Well——

A. Now, the question of what costs what I did not even consider. It might be implicit, but that is beside the point as far as I am concerned.

Q. Well, now, let's assume you have five customers each of whom gets fifteen minutes of service on one day and no service on the other day. One gets the service on Monday, the next on Tuesday, the next Wednesday, the next Thursday, and the fifth Friday.

Now, in the manner in which you used your data, let's assume that the time study was made of those five customers, it happened to be that you picked up one of them on the day he got the service and none of the rest came up, which is what would be expected.

A. Yes.

Q. Now, I take it you would have used that data in a

way which was different than if you had assumed that each of them got the equivalent of three minutes per day.

A. Well, I am sorry, I don't understand your question. You have five customers each being served on different days?

Q. No, each being served every day but receiving cus-
[fol. 148] tomer service.

A. That is what I mean, each on different days?

Q. On different days.

A. All right. Now, each customer is treated as an independent observation and his time measurement of that customer service together with his volume is reflected in the sample in respect to the size class into which he would fall, together with the time spent.

Q. But I am correct, am I not, in saying you did not treat that kind of data in the same way as if you assumed that each got the equivalent of three minutes of a day?

A. No, no.

Q. So——

A. I did not classify this by size, the amount of time spent per point. This is classified by volume.

Q. Now, what you do, though, is to plot your data by excluding the days on which no customer service was performed?

A. That is right.

Q. And treated the data as though it showed fifteen minutes for the kind of customers we have been talking about, rather than an average of three minutes?

[fol. 149] A. No, no. That does not follow.

Q. Well, let's look at the first line on Table 10-A, and find out just how you went about it.

A. Because I don't see how you could get a customer that way.

Q. Well, may I direct your attention to Table 10-A?

A. All right.

Q. Now, on the first line you are dealing with stores who take between one and five points——

A. Units in this case, units.

Q. Units per day.

A. Units.

Q. And you found there were twenty such stores?

A. That is right.

Q. Which took a total of fifty-five units.

A. Yes.

Q. And you found on your sample days five of the stores took customer service and the others did not.

A. That is right.

Q. Is that correct?

A. Yes.

Q. All right. And then——

A. And then they had eleven units delivered to them.

[fol. 150] Q. They had eleven units on an average per store delivered to them?

A. Oh, wait a minute; no, no, no. Five received the services.

Q. There were eleven units delivered to those five and the average delivery of each of those five was 2.75.

A. Of the twenty customers, five of them received customer service that day.

Q. And those five took a total of eleven units?

A. And they spent a total of three minutes. There was a total number of minutes involved with all five of them performing that service of three minutes.

Q. Three and three-one hundredths minutes.

A. Right.

Q. All right. Now, what is Column 6?

A. Column 6 is the average number of units per store.

Q. In other words, that is the figure in Column 4 divided by the figure in Column 3, eleven divided by five?

A. That is right.

Q. And Column 7——

A. Is then the number of minutes divided by the number of stores in Column 3.

[fol. 151] Q. In other words, that is the figure in Column 5 divided by the figure in Column 4?

A. That is right.

Q. And that produced a figure——

A. Converted to one-hundredth of a minute.

Q. Right, 27.55, and that is the dot way up at the top of Chart I-A, right?

A. That is right.

Q. All right. Now, then what did you do—I take it then after you drew your lines and made your equations, you reduced that to 21.66?

A. Remember now, this 27 reflects——

Q. That is the actual point on Chart I?

A. That is the actual point with respect to the actual location of the average within that class.

Q. Right.

A. This class ranges from one to five. That 27 is plotted at two.

Q. And what you did——

A. Twenty-one six reflects the extrapolation of that average curve of all the points.

Q. After you made all your calculations and all your plotting, and had drawn your curve, then you read 21.66 [fol. 152] off the curve?

A. Right, for one unit. That represents the amount of time it takes to deliver one unit of product.

Q. All right; now what do we find in Column 9? What is 13.04?

A. This is only for purposes of comparison of my data with your data to show the effect upon the ultimate conclusions. I don't accept the proposition but that is what I have done.

Q. Well, turning back——

A. I will tell you what I have done. You will see it better I think by referring to Chart I-A. Now, Chart I-A, the first one where the actual scatter diagram is at the actual level. Now, your average of thirty-three hundredths of a minute per point is the total time spent in performing this customer service of all these independent stores, divided by the number of units delivered to all stores, whether they took it or not.

So, in order to have my curve represent that same condition, all I had to do was deflate the curve so that, since your thirty-three hundredths reflects the amount of time at the average store, all I have to do is adjust my curve [fol. 153] downward to the point where thirty-three hundredths on my curve will fall at the average size of the store, which comes up to be 55.8, I think.

So, in other words, all I have to do is deflate all the calculated values on Column 8 there by the ratio of——

Q. 3.3?

A. 3.3 over whatever my average, weighted average, of my actual data came out to be.

Q. In other words, you multiplied the figures in Column 8 by this constant relationship?

A. Yes.

Q. 3.3 over 5.48 is what we have.

A. Whatever the actual average is.

Q. Now, by multiplying by a constant ratio, did you not assume that there was a constant relationship between the frequency of occurrences of customer services at all volume levels?

A. Probably in terms of ratio.

Q. Well, you had to in order to use the same figure at all volume levels?

A. Yes. Of course, now, remember what I am doing here. [fol. 154] I am reflecting merely another adjustment. Now, I have abstracted this information now from the particular example itself. I am using it now as a theoretical curve and I am adjusting it for another set of conditions which prevail in a comparative table, namely, your own. That is all I am correcting this table for. I am not making any other assumptions than that.

Q. Well, but you did make the assumption that there was the same frequency of customer service at all volume levels in making the corrections from Column 8 to Column 9?

A. Frequency has nothing to do with it, as far as I can see.

Q. Well, what exactly does this ratio of 3.3 over 5.48 indicate?

A. An average.

Q. An average of what?

A. An average ratio of your time, average time to the average of my time.

Q. And what is the difference between the Bowman time and the time figure you used? In what respects are they different?

A. Mine does not reflect the stores which—my original [fol. 155] calculations do not reflect the stores that did not take the service.

Q. Yours did not reflect the stores or the occasions on which the study showed no customer service, but it might have been the same store took customer service one day and no customer service on the next day and it would not reflect the occasion when he did not take customer service?

A. That is right.

Q. And isn't it true that the purpose of making this conversion from Column 8 to Column 9 was to take into account the occasions on which no customer service was rendered, as well as the occasions on which customer service was rendered?

A. Yes, more or less as an average rough adjustment.

Q. And this adjustment, using a constant figure for all volume levels, is valid only if the number of occasions on which customer service is taken, that is, relatively speaking, —is the same at every volume level in this table 10-A; otherwise, you would have to use something other than a constant, wouldn't you?

A. Well, if the ratio to one another is similar; it would not have to be identical.

[fol. 156] Q. Well,——

A. For the purposes of this chart that refinement is not necessary, I don't think.

Q. Now, isn't it true——

A. However, it could be made.

Q. Isn't it true that in your ultimate conclusions in the higher numbered tables toward the end of your presentation that you based all those calculations and conclusions on the data in Column 9 and not in Column 8?

A. Yes.

Q. So you did take into account in those conclusions in this manner the occasions on which customer service was not rendered?

A. Only for purposes of comparing with yours.

Q. Now, in fact, your Chart II demonstrates that customer service is rendered more consistently, that is, with more regular frequency, at higher volume levels than it is at low volume levels?

A. Yes.

Q. And that the occasions on which no customer service is rendered occurred in the sample more frequently at the low volume levels?

A. That is right.

[fol. 157] Q. All right. Now, is it not true, Mr. Woolley, that the method which you followed in Table 10-A of first excluding the occasions on which no customer service was rendered and making the calculations in Chart I-A, then

later bringing them back in by using the constant that we have described, in order to calculate Table 9, produced a curve which was more sharply—which is a greater curve and less of a flat line than if you had averaged in the occasions on which no customer service was rendered from the beginning?

A. I don't know.

Q. Well, let me just—

A. Because I have not done it that way.

Q. Well, just take the first line again as an example. If instead of excluding the occasions on which no customer service was rendered, and limiting yourself to Columns 3 and 4, then dividing later on in Column 7, dividing Column 5 by Column 4, which gave you this figure 27.55, gave you the top dot on your line; if, instead of doing that you had simply divided the figure in Column 5 by the figure in Column 2, you would have gotten a very different point, would you not?

A. Oh, surely.

[fol. 158] Q. It would have been lower than the point you did get?

A. Surely.

Q. And isn't it true that—

A. Likewise, way down here at the lower end of the scale you are dividing by—Yes, you would have gotten roughly the same figure there.

Q. Isn't it true in the low volume levels you got points which are higher than you would have gotten if you included the occasions on which no customer service was rendered; whereas, at higher volume levels, that is, over the average figure used in your constant, the tendency would be the reverse?

A. Possibly. It probably has that effect.

Q. So the tendency of using the approach which you used—

A. For the adjustment purposes.

Q. That is, of using a constant for adjustment purposes, rather than taking averages at all levels, was to produce points with higher values at the left-hand end of Chart I-A and points with lower values at the right-hand portion of Chart I-A?

A. There is that effect in there, yes, but I do not think [fol. 159] it is the sole effect.

Q. And isn't that precisely what I was talking about earlier?

A. The point is the shape of that curve would tend to be modified, yes, but not completely flattened out.

Q. Well, have you tried to plot all the points you would get by merely dividing Column 5 by Column 2 and seeing what the curve would look like?

A. No.

Q. It would look quite different, though, would it not?

A. This extreme value here would be reduced, but there would still be a curvature in there, I am sure. It would be interesting to see. Maybe I will do it when I get back to the office.

Q. And isn't the approach which you followed comparable to a situation which we were talking about earlier when Mr. Long suggested it was purely an assumption and hypothetical, of treating a man who receives fifteen minutes of customer service on the fifth day, and plotting him way up at the top as you did over on the left, whereas, if you treated him as though he received three minutes every day for five days, then the line would be at a much lower point? [fol. 160] That example fits what we have been talking about?

A. Well, if you average in the days that he did not take the service, sure.

Q. So that the effect of not averaging them in by a procedure which would merely divide the figures in Column 5 by the figures in Column 2 is to assume that there is a difference in the cost of serving a man who takes, for example, fifteen minutes every five days as contrasted with another man who takes three minutes every day?

A. No, no, because when you average the one you come out with the same answer you would get with the other.

Q. If you did average the fifteen minutes in, but you in fact did not follow that practice?

A. Well, I did in a general way, but it is not as refined as the way you are suggesting.

Q. You followed a practice which would give a radically different result for those two different customers?

A. I followed a practice which did not compensate com-

pletely for what it purports to do. Yes. It does compensate to some extent, but not to the extent that you are thinking of.

[fol. 161] Q. Well, on the example we have been talking about, if you assume on each daily delivery he takes ten units with an average of three units per day, then if you follow the procedure of dividing Column 5 by Column 3, you would assume .3 minutes of customer service; whereas, if you followed the procedure you followed you would take fifteen and divide it by ten, that is, number of units, and get one and a half minutes of customer service.

A. To get this line down at the bottom of the chart.

Q. Right, which would give you one and a half minutes of customer service, so you would then correct by your constant of 3.3 over 5.48, and end up with a figure of about nine-tenths of a minute of customer service, which is three times as much as if you simply averaged them together?

A. It is possible.

Q. All I am trying to illustrate, Mr. Woolley, is that your difference in the method of handling the figures will produce a curve which has a different shape from the one which would have been produced if everything had been lumped together?

A. A slightly lower level at the smaller-sized stores.

Q. Well, at the higher level it would tend to bring the [fol. 162] line up?

A. No, it would not affect them too much because your proportionate relationship there is not too great, I don't think.

Q. Well, for example, look at the bracket from 180 to 200. If you merely divided the figure in Column 5 by the figure in Column 2——

A. From what to what?

Q. From 180 to 200.

A. Oh. I see. You have got the same numbers in both columns.

Q. There is no change, so it would be 5.96, the figure that ——it would end up on your Chart 1. That would not change Chart 1-A, it would change 1-B, wouldn't it?

A. That is the trouble. You are going back to a sample for one purpose and I am using it——I have already abstracted the sample out of this, and this represents a gen

eral condition. I expect in these classes where I actually observed the samples, the same number—I mean, no stores that did not take it, there may be stores that did take it all the time and there may be stores that did not take it all the time, I don't know, but as far as the use of my data is [fol. 163] concerned, I don't have to worry about what you are talking about now, because I have already abstracted my generalization from the basic data.

From there on it assumes that if a store takes it, the probabilities are they will get this kind of a time test. If they don't take it, then it will be averaged to this extent.

Q. It assumes, does it not, Mr. Woolley, that there is a difference between a store that takes ten minutes every other day and a store that takes five minutes every day? That is an assumption which is made in your development?

A. It probably is in there, I suppose.

Q. And if that assumption is invalid, it would affect the use of all the figures which are at least in part predicated upon the calculations in Column 9 of Table 10-A?

A. That particular curve, yes. I recognize the fact that that exists, but I am only using the curve for purposes of comparison.

Q. But that is all you do in the whole study, isn't it?

A. That is right.

[fol. 164] Q. I understand earlier in your testimony you indicated you don't subscribe to the study as a whole, you have merely presented it as an improvement upon the Bowman presentation?

A. That is right, or as indicating directions in which improvements can be made.

Q. Yes. This may have been covered by Mr. Ball's examination, but in your proposed testimony in rebuttal, did you make the assumption that the drivers influenced the volume of fluid milk being sold to the chain stores?

A. I did not say they did, I just said there is a possibility that they can. They have opportunities to do so.

Q. But you did not make an assumption as to whether they did or did not?

A. No, or at least I did not intend to.

Q. All right. Then in Table 15 there are a couple of footnotes I want to ask you about. Footnote 9.

A. Table what?

Q. Table 15, Footnote 9 says:

> "I excluded drivers' time spent on collection and delay to collect from independents for comparability with [fol. 165] costs of billing and collecting to chains submitted by Bowman which is unavailable."

Would you explain what you mean by that footnote?

A. Well, this collection and delay to collect reflects or is supposed to reflect the cost that it takes Bowman to make these collections through the driver from independents, which I understand do not do so for chain stores.

I understand from the record that the chain store comparable collection procedure is handled through the Central Office, is not in the hands of the route drivers, and that that latter costs of collection from chain stores on a billing basis is not included in the study and, therefore, to include one item of cost and not another makes for a bias in the results to that extent.

Q. Now, if.

A. So, therefore, this should either—either both should be excluded or both included.

Q. Now, if the costs of billing chains is offset by the cost of computing discounts payable to independents at [fol. 166] roughly the same procedure you have gone through for both and they tend to offset one another, would you still feel it appropriate to do what you did in Footnote 9, namely, exclude collections and delay to collect time?

A. Well, that is a question of fact I would not know. It is a question of fact. Whether they do offset it or not, I don't know. I am only going on the basis of the records before me.

Q. It isn't that you deny the existence of an actual cost element under collection and delay to collect, but you have taken sort of a rough method of

A. Correcting for bias that I feel is in the data, because there is no information in this data to add on the other side of the equation which has been added only onto one which I see is avoided. I don't know what the reason for it is. That is something else again.

I mean, as the record stands now, as far as my information is concerned, the inclusion of this is an incomparability.

Q. Now, does the same explanation apply to Footnote 1 on Table 16-A?

A. If I remember rightly, yes.

[fol. 167] Q. That is about solicitors.

A. Yes. There is nothing about costs of solicitation to chain stores in there.

Q. You don't share the misconception that Mr. Sawyer shared that the Bowman study failed to charge the chains for any portion of the costs of the solicitors' wages? You appreciate that——

A. No. My understanding is that that solicitor's wages—No, I agree with you in terms of your formula that there is a portion of that charged to the chains, but my view is that it is improperly charged, because my understanding is the solicitors deal solely with the independents and that their corresponding activity is handled through Central Office personnel.

Q. But you would agree with me that Mr. Sawyer's proposed comment on this particular point reflects a misconception of the Bowman study?

A. If that is the view that he is stating, surely.

(Discussion had off the record.)

By Mr. Stevens:

Q. What do the various exhibits in your portion of your material which deals with the bulk wholesale, in other words, Tables——

[fol. 168] A. Well, it will be Tables 19 on.

Q. 18 through 30 and Exhibits M through Q in Folder C. What is all that supposed to show?

A. Well, the conclusion is that there is no cost justification for these price differences that exist between them as of March, '55.

Q. Do you feel that you have applied sound accounting principles in analyzing the cost differences?

A. Within the limits of the data available, to the best of my ability.

Q. Did you make the same kind of study of bulk as you did of——

A. No. The two are entirely different.

Q. Why did you follow a different approach?

A. I did not have to.

Q. Pardon me?

A. I did not feel that I had to because, taking your own data, using your own data, and without any modification for any cost study, or anything like that, I have sufficient information at least to bring me to the conclusion the prices are not justified to the extent shown on Tables 18-A, B and C.

Q. All right. Now, your reason for following a different [fol. 169] approach on bulk than you did on store was not because the same kind of data was not available with respect to bulk, but rather that you did not feel it was necessary to use it; is that right?

A. In the first place, I think it is true from reading your Exhibit 42, Bowman Exhibit 42, wherein you outline your cost study for the bulk wholesale customers, my understanding is essentially you use the same theoretical approach modified to meet the precise conditions that you find in bulk wholesale.

Essentially it is the same approach in terms of principle and theory that you used. So my conclusion is whatever deficiencies are normally found in the formula which make that theory inapplicable would also be in the bulk, so, therefore, I came to the conclusion all I need to do is examine your results from the cost study as they exist, to apply them to the individual product which you do not do, for each of the restaurants, and compare them with the specific prices for each of the products with the corresponding pairs of restaurants, which you did not do, in order to see how the price differences that are involved in that charge are justified or not for these particular costs as you de- [fol. 170] veloped them.

Q. Well, just a very simple point I want to make. First of all, you did request some additional data to help you make your store study, and you got the data that you asked for?

A. Oh, yes.

Q. But the fact you don't go into the same detail with respect to bulk is not because Bowman failed to give you what you wanted?

A. No.

Q. It is just that you did not feel it was necessary to ask for it?

A. I did not ask for it because I did not feel I needed it.

Q. So there wasn't an effort made to ascertain whether the same kind of detailed study could have been made?

A. No.

Q. You just did not feel you had to do it?

A. I did not feel I had to do it with the results that came up with the data that I had.

Q. Well, now, do you feel that you did apply sound accounting principles in coming to the conclusions which you did come to?

[fol. 171] A. Within the limits of the data that I had available, and that I knew you had, without putting you to a lot of work, I realized that—well, excuse me.

Q. Well, now, in making your study, one of the problems you had to cope with was to separate the cost of delivery of non-fluid milk from the cost of delivering fluid milk, was it not?

A. That is right.

Q. And by what procedure?

A. That is indicated on the Table, 19, I believe.

Q. Basically what you did, was it not, was to take the aggregate sales price of the non-fluid product, the aggregate sales price of the fluid product for each customer, and find a percentage, then assume that the percentage of delivery costs would be related to the percentage of sales price?

A. I realized at the outset that that was not a precise method of doing it, and if I had the basic data to do it I would not do it that way; I mean, that is all I had available.

Q. Well, you would agree that that is not a sound method of proportioning delivery costs, would you not?

A. I would not say it is not a sound method, but it is [fol. 172] not necessarily the best method. It is a suitable method.

Q. Well, can you think of a better way to do it?

A. Oh, without getting into analysis, detailed cost analysis—actually what should be done, your initial cost study should not be developed in terms of an overall package deal, but you would have to go and analyze the costs you came up with, delivery costs for each of these products and

allocate the transportation costs on all these items to the individual products that are carried, which you did not have to do with the wholesale customers, because here the problem is different. The price structure requires it.

Really, what should have been done, the delivery costs should have been analyzed by product, not just stop with what you got for a total like you did here.

In other words, my difficulty arises from the lack of refinement in your cost study that you had to start with. Without putting you to a lot of work, I just used this system to get around it. This is an aggregate way of doing it but it is really not the best way.

[fol. 173] Q. Now, isn't it possible that a change in the division between fluid milk and non-fluid milk would in turn—might in turn produce a change in the delivery costs of each of the items of fluid milk which you were in fact analyzing?

A. Oh, yes, sure. Any time you change the composition whole, the composition of a whole that you carry, that would change the cost accordingly.

Q. And every time you would change such a cost that might in turn result in a change in the comparison of the cost of delivery of that product to that customer, with the cost of delivering a comparable product to some other customer?

A. Oh, surely.

Q. So the method of allocating delivery costs as between fluid and non-fluid products might cause a large number of differences in your ultimate results of how many instances of cost justification and how many instances of non-justification?

A. It is possible.

Q. And how many such instances there would be you could not determine without making some other analysis?

A. That is right. I could not make a more detailed [fol. 174] analysis from the data I had available.

Q. Well, what more data would you have needed to make a more appropriate analysis?

A. Well, I would have to have gone into the details of cost study to get the basic data and do a considerable refinement, which I think frankly you should have done to start with, in order to ascertain the costs and allocate them

to these various products that are carried on a truck. That is really the way it should have been done.

Q. Now, in dividing your cost of delivering non-fluid products——

A. Pardon me. Furthermore, your costs there would have to be some method of ascertaining the effect of container size upon these costs, also.

Q. In other words, I take it what you are suggesting is that you also employed an unsound method of apportioning costs on different fluid milk products?

A. That is a rough measure. I think that is not too unreasonable.

Q. Because you did that simply upon a gallon basis when, in fact, I take it——

A. Oh, I expect the costs of delivery—I don't know, I [fol. 175] have not investigated to see, but it is possible that the cost of delivering a half pint of cream might not necessarily be directly proportional to the number of units of half pints in a gallon, as assumed in this work here.

Q. But in your work you made the assumption it would be?

A. I had to make that assumption for lack of information. Obviously, as a technician employed by Bowman or Borden either, for that matter, I would have gone into that question if I were faced with that kind of a problem.

Q. If you had not made that kind of assumption, but had made some other assumption, you would have gotten different cost figures for the various products and you might have had some of the relationships which now seem to be cost justified that would appear to be not cost justified, and vice versa?

A. Surely. Any change you make would alter the end result. I made the best, reasonable assumptions I could from the data I had available.

Q. Well, by "had available," is the data that you actually did request and use?

[fol. 176] A. That is right.

Q. But you have not made an effort to determine what additional data you would have needed to do an accurate job?

A. Well, frankly, I did not think that question of accu-

racy of job was necessarily my function. That is the function of Bowman, it seems to me.

Q. But you did do a lot of adding and subtracting and preparing of tables here, and I assume they are intended to perform some function?

A. To raise doubts of the validity of a defendant's work here.

Q. Now, you started in approaching the problem of apportioning the costs as to one customer with certain cost data which showed the costs of the transaction with respect to specific customers that had been prepared in the Bowman studies?

A. Yes.

Q. And the material which you worked up here was not intended to question the accuracy of the transaction costs which were used by Bowman but, rather, to go on and use them for further refining and show that

A. The using of these data, the end conclusion is con [fol. 177] trary to what Bowman claims.

Q. Right, but you both started with the same data, the data as to what the cost of the given transaction was, and then you went on from there?

A. With the reservation, of course, that I do not accept the costs per se as being a correct representation, but assuming they are, what will the result be if you apply this data as they say they have applied it to the price structure.

Q. Right, but the subsequent development which you found in your chart is not intended to be a demonstration of any weakness in that, in the cost of particular transactions?

A. No. That is implied by the nature of the development itself, that you have done.

Q. Yes.

A. That had all been taken care of.

Q. Now, you may have answered this, Mr. Woolley, but I am not sure. I want to give you an opportunity to, if you haven't. Have you told us—Paragraph 25(e) refers to the fact your work was instead of a more correctly conceived cost analysis by products—have you told us how in your judgment it would be appropriate to compare the [fol. 178] cost of each——

A. What page is this? I am sorry. Pardon me.

Q. Page 29.

A. On Page 39?

Q. Yes, Paragraph 35(e).

A. Excuse me.

Q. (Continuing) —how in your judgment it would be appropriate to compare the cost of delivery in respect to each individual product?

A. I have not outlined any detailed procedure for it, no, and without going into the details of the cost analysis and the route structures, and all that sort of stuff, I at the moment do not have any suggestion.

Q. I have a couple of questions on competition. I am sure it won't take too long.

(Discussion had off the record.)

By Mr. Stevens:

Q. Now, I am returning your attention to the other group of exhibits.

A. C?

Q. I think A is the other one.

A. Folder A?

Q. Yes. What in general are those exhibits intended to do?

[fol. 179] A. They are intended to show the extent to which people shop around for their fluid milk products at Bowman stores and other stores, any of these sample stores that were put into the prima facie briefs.

Q. Are they intended to make the point that given individuals who live in that area buy fluid milk from a variety of sources?

A. Yes, yes. Now, of the Bowman stores as well as non-Bowman stores.

Q. Now, are there any charts or graphs or exhibits in this Folder A which are intended to show the extent of competition between any one of the sample stores, such as Goldenstern's, for example, and any other of the sample stores, such as the Kroger Store, at 7260 Wentworth Avenue, for example?

A. Yes.

Q. Which of the tables is intended to show—Let's keep the same example: The extent of competition between the

Goldenstern's Market and—did I say the Kroger Store—the Kroger Store at 7260 South Wentworth? Which are the tables?

A. Not specifically by identification of these particular pairs, no, but they do exist and they are summarized in the [fol. 180] general information on Table 7(a), the next to the last table.

Q. Now, first of all, is this the first table or the only table which——

A. No, some of this information is summarized on Table 3, I think.

Q. Table 3.

A. The last column shows the number of customers not receiving home delivery, customers who buy from at least one pair of these sample stores.

Q. Well, can you tell by looking at Table 3 or by looking at Table 7(a) how many customers purchased milk from Goldenstern's and also from the Kroger Store at 7260 Wentworth?

A. No, you can't do that. All you can show from Table 7(a)—you can say that Psomakos' store out of the nineteen customers who were sampled on that date—well, I am sorry, I am looking in the wrong column. Strike all that.

Of Psomakos' sixty-seven customers——

Q. Mr. Woolley, may I interrupt? I was asking about Goldenstern's and Kroger. I will try to stay with the same sample.

[fol. 181] I am sorry. On Table 7(a) it is shown with respect to Goldenstern's, forty-three customers who were sampled on that particular sample day of your survey.

A. And who responded to the milk questionnaire. Of that forty-three, four of them bought milk at Goldenstern's and either A&P or Kroger's.

Q. Now, where do you find that?

A. Because the heading says, "Bowman chain and independent sample stores only." So these four bought at Kroger, which is an independent, and one or the other or both of the A&P and Kroger.

Q. But now, does that column include instances where the people bought from some Kroger or some A&P other than——

A. No, I said sample stores only. They are people who

I observed, when you take their return questionnaire, they will have only two stores shown. These people will have a Goldenstern's shown and an A&P or Kroger, or maybe both.

Q. But now are you saying that they will have the particular A&P or the particular Kroger?

A. These particular A&P's I have got listed here, that [fol. 182] is what I mean by sample store for this group. That is exactly what I mean by definition. The sample stores by definition for these six stores here and none of these customers, and on the questionnaire itself only for this particular group of at least four, five and six, the questionnaire relating to them only included Goldenstern's, A&P and Kroger as those sample stores they were going to identify as trading at.

Q. And you are saying that that figure four indicates that there were four people who bought at Goldenstern's, and they also bought at the A&P store on Wentworth Avenue or the Kroger Store on Wentworth Avenue?

A. Or both.

Q. Or both?

A. Or both.

Q. Well, our review, just so you will know it, our review of the material which you supplied us does not support that.

A. Well, I think it is there.

Q. I think we will have to get together on that.

A. I think we will have to get together then, because I am pretty sure it is there.

Q. Now, it is correct, isn't it, that in your questionnaires that you sent out, you included questions about chain stores [fol. 183] other than the sample stores?

A. We asked them to list other stores if they did not buy at any of these or if they bought at others in addition to these listed, they would include those and identify by name and address.

Q. Well, now, didn't your questionnaire itself list other chain stores?

A. Oh, yes, it did. Well, that is all right. It is still faulty, because in my definition I included only those and these four are those only which out of those listed stores there in which A&P and Kroger on Wentworth are identified here That is Store E and Store A, and Goldenstern's down here some place, P.

When I got the questionnaires back, those are the questionnaires which showed either Goldenstern's or Kroger or A&P.

Q. Now, Mr. Woolley, I did not mean to mislead you, but I was quite sure you made a mistake. I want to call your attention to this. Look on Table 7(a), Footnote 4. You notice the four we have been talking about over on the right.

A. All right.

Q. Which is a quarter mile area which is included [fol. 184] within all areas obviously. That footnote says:

> "Includes those customers trading also at the Kroger Store at 6914 South Wentworth."

A. Well, that is in the trading area. It is still a chain store.

Q. Yes, it is still a chain store but——

A. I mean, still a chain store and Bowman store.

Q. But you would modify your answer, would you not, on the basis of that footnote? It is not one of the sample stores.

A. Well, to that extent, yes.

Q. So that——

A. How many are there? Which one of the four is in that category? I don't know. I would have to check them.

Q. Well, whether all of them are in that category.

A. What?

Q. You cannot tell from the table whether all of them might be in that category?

A. If you would like that point clarified, I think we can do that.

Q. Well, the only thing I want to make clear is that [fol. 185] except for the possibility of this column, which I had not understood to indicate this, there isn't anything in these charts which shows the extent of competition between the specific sample stores which are included in the study.

A. Well, this column is intended to do that.

Q. But this column is not broken down to show the extent of competition between any two pairs of stores?

A. No, not specifically. I did not think I had to. I did not think it was necessary.

Q. But, for example, in Line 5——

A. To my thinking it is immaterial as long as you can demonstrate that there are customers who have responded to the effect that they did trade at these stores. Of course, the specific stores, if you want them identified, that can easily be done.

Q. Well now, the A&P store on Line V there, apparently the customer who shopped there shopped at only one other sample store. You only found one other customer from the A&P?

A. Yes. That was Goldenstern's.

Q. So presumably he may have shopped at Goldenstern's, or he may have shopped at Kroger, for all those shows?

A. No, this has a chain and independent store combina- [fol. 186] tion.

Q. I see. And there is one at the Kroger Store apparently who also shopped at Goldenstern's?

A. That is right.

Q. So you found one instance of a man who shopped at Kroger and Goldenstern's and one instance of a man who shopped at both A&P and Goldenstern's?

A. That is right.

Q. Your other two instances under Goldenstern's apparently are the other Kroger Stores?

A. No.

Q. Or something else?

A. These are entirely different individuals. This one up here is not included in the four above, and the one down below is not included in the four above, and the one in No. 6 is not the same as the one in No. 5. (indicating)

Q. Now, for the purpose of your example, your label on this last column, Column 7(a), is Goldblatts treated as a chain or independent?

A. Chain.

Q. So that you have not made any effort to determine the extent to which people who shop at the A&P also shop [fol. 187] at Goldblatts, or vice versa?

A. No, because it was only between independents and by definition Goldblatts was part of the chain picture.

Q. Well, now, did any of the other tables show anything about the extent of competition between these sample stores?

A. No. The tables do show the extent to which——

Q. People shop around?

A. People shop around, and among Bowman, chain and independents generally.

But this last column only deals with these specific stores identified on the left.

Q. I take it, Mr. Woolley, you did not make any comparability tests to determine whether the people who responded to mail questionnaires were comparable to those who did not respond?

A. No.

grocery store?

A. They usually indicated when that was the case. They indicated that on the questionnaire.

Q. Did you make any tests to determine the people who responded who had their milk delivered at home, as to whether that milk was delivered by a dairy or a retail

Q. How would they indicate it?

[fol. 188] A. They wrote in the name of the dairy.

Q. But those who merely checked "home delivery" without writing the name of a dairy, did you make any effort to determine how many of those had their milk delivered by a dairy and how many had it delivered through a grocery store?

A. Well, they had it delivered by a dairy, period. Otherwise they would not have checked that they had home delivery.

Q. How do you know that?

A. Because that is what is called for. Home delivery is dairy-delivered.

Q. That is what you intended?

A. That was the intent of the questionnaire and that was what was understood by the people who did respond.

Q. Let me put it this way. Apart from the questionnaires themselves, you have no information as to whether the people who checked home delivery had their milk delivered at home by the grocery store or by a dairy?

A. May we go off record for a moment?

Mr. Stevens: Off the record.

(Discussion had off the record.)

[fol. 189] By the Witness:

A. I think the question is clear enough by itself. The question is, "Do you have your milk delivered at home?"

Well, now, any man who receives milk at home, ninety-nine times out of a hundred, it is going to be by a dairy. That is the common, ordinary sense of the question. Groceries don't make deliveries unless you specifically request it.

Q. Did you make any effort to ascertain whether Psomakos or Goldenstern's or any of these chains make deliveries in the areas which you were studying?

A. I know the A&P doesn't.

Q. How about Psomakos and Goldenstern's?

A. I don't know about Psomakos.

Q. How about other independents in the area?

A. I don't know about those.

Q. You do know that there are grocery stores in the City of Chicago that deliver milk?

A. I do know that the average individual reading that question would immediately think in terms of a dairy delivering at homes in the first place, a group of people if they are going to go to an independent, they usually go by themselves. They very seldom have it delivered. They are a [fol. 190] class of people that would not think of that. They are not used to having service like that. I am pretty sure these small independents would not want to have the cost to themselves of making that delivery.

Q. Do you have the questionnaire which was sent to the people in the Psomakos group and also the questionnaire that was sent to the people in the Goldenstern group?

A. Just a sample of it.

Q. I mean the form of questionnaire?

A. Yes.

Q. I wanted to ask you why the different question was asked for two different groups?

A. Oh, I was afraid you would ask that. That is nothing more than bureaucracy involved. These forms—incidentally, that is one of the troubles with these forms, they are not in the original form that I intended them to be but that is the way they came back to me from Washington approved.

Q. Did Washington direct you to ask different questions of the two different groups?

A. They approved the first one and that was six months earlier, and the second one they had no reference to the [fol. 191] preceding one. In other words, it was just another questionnaire they had to approve and they did not even think about the preceding one. So they just made the changes on the second one according to their own current thinking, or whatever they happened to be thinking about at the time.

Q. Which was the first one and which was the second one?

A. The Psomakos group—wait a minute, now.

Q. The Psomakos group, as I understand it, was asked the question——

A. I am sorry, that was true of the Borden because we had a repetition mailing. That is what happened there.

Q. But that isn't the explanation of the difference in these?

A. I am sorry, these went to Washington and back again at the same time. The first questionnaire is identically the same as far as I can see.

Q. The question to which I have reference is:

> "If you buy milk from the following stores, indicate with an 'X' the frequency of your purchases."

which is the question asked of Psomakos and Goldblatts. [fol. 192] The question which is asked and substituted in the other group is,

> "Indicate with an 'X' the frequency with which you buy milk from the following store or stores——"

A. Yes. Frankly, I have no explanation for the difference.

Q. Well, you notice the significance of the differences might be that the latter form of question asks for the frequency of purchases of milk, whereas, the former question asked of the people who went to Goldblatts merely asked for the frequency of purchases without saying purchases of what.

Presumably, the people who shopped at Goldblatts may buy quite a variety of items.

A. No, because the covering letter says this:

> "With respect to your purchases of milk, would you therefore kindly check the appropriate answers to the questions in the attached list and return your answers in the enclosed envelope which requires no postage."

That should be clear enough as to what is intended. The [fol. 193] same thing applies to the other because the letters are practically identical except for the stores involved.

Q. Well, in other words, you do not have any explanation for the difference in the form of questions?

A. No, it just happened that way. I don't have any explanation. To me it does not make any difference anyway because it was taken care of by the letter.

Q. Well, was it intentionally taken care of by the letter or do you now think it probably was taken care of?

A. No, it was. I intended them to indicate the extent to which they purchased milk. This whole thing is directed toward milk and I wrote that paragraph intentionally that way.

Q. Well, I am sure you so intended, but I am just trying to find out the areas in which you may have failed to accomplish your intent by a slight change in wording, or something like that.

A. I did not intend any change in concept merely because Question No. 2 in the two different questionnaires happened to be worded differently. That is an unfortunate circumstance that they were. I did not intend any different inference to be drawn.

[fol. 194] Well, now, look at Table 4 a minute, if you will, please. See, the last column on the right talks about one pair of Bowman chain and independent stores. I take it the figures in that column are not necessarily based on sample stores?

A. The last column?

Q. The last column on the right.

A. No. That includes the sample stores plus all other Bowman customers who picked up in writing the store names they included on the questionnaire when they responded.

Q. Let me go to that Footnote 4 again where you indicate a purchase at a different Kroger Store. What was the purpose of including that instance in that?

A. If I remember rightly, that is on the same route as these other stores. I think this store was included in Schedule 3 where we listed—I think it is Schedule 3—where we listed our sample of routes. I think that was one of the stores. I think it is also on the map, included on the map as one of the stores within the competitive area. It was a chain store.

Q. Now, on Table 7(b), we have got a lot of percentage figures. Do you have any percentage figures in that table which are intended to reflect the data in the last column to the right on Table 7(a)?

[fol. 195] A. Yes, the last column. See, each one of these columns refers to the corresponding column of 7(a), or are supposed to.

Q. Well, you have got a figure opposite Goldenstern of 32.6 per cent in that column?

A. That is right.

Q. That is 32.6 per cent of what?

A. Well, of total of customers there which is reflected as a hundred in the first column with the customers with no home delivery.

Q. How many customers are you talking about?

A. Oh, forty-three.

Q. In other words, roughly a third of the forty-three customers did what?

A. No, that does not look right. That does not look right. Wait a minute here. That must be an error.

Q. Pardon me?

A. That must be an error. That has to be an error because there were only forty-three customers to start with and there are only four in that category.

Q. Are you sure, Mr. Woolley, that that percentage column isn't intended to reflect the figures in the next to the last column on the right in Table 7(a)? It has the [fol. 196] same label as the next to the last column.

A. No, it should not have been. If it was, it was a mistake.

Q. Well, you see, you notice——

A. It is not intended to be.

Q. In Table 7(a) your next to the last column——

A. Bowman independents and non-Bowman stores, but there is no relationship between the two.

Q. Then you have got—That is the same title that appears on the last column in 7(b). The next to the last column on 7(b)——

A. Oh, oh, wait. I see what you mean. This last column on Table A, 7(a) has been omitted from 7(b) by typographical error. (indicating)

Q. That is omitted?

A. The percentage calculation has been omitted. Oh, I see what you mean. Yes.

Q. So that——

A. That will have to be rectified.

Q. Yes. The only column on Table 7(a) or at any place in all these exhibits which is designed to show the extent of competition among sample stores is the only one you excluded from Table 7(b)?

[fol. 197] A. Well, I did not exclude that by design.

Q. It was a typographical error? I see.

A. A typographical error. That will be replaced. I will have the girl type a new page or new table. I had not noticed that. I will have to do that table over.

Q. And your percentage calculation which you will make will be—just to look at 7(a) again—will be taking the very top column, the ratio, for example, well, that will be four to forty-three?

A. In the case of Goldenstern's?

Q. Yes.

A. Yes.

Q. Which, of course, includes that other Kroger Store there?

A. Yes.

Q. But taking examples where they are not included, they go to the very top of Groups 4 to 6, 6 to 124. It would be about five per cent, or something like that.

A. Yes, average.

Mr. Stevens: I think that is all I have.

[fol. 198] Redirect examination.

By Mr. Long:

Q. Mr. Woolley, you have been asked by Mr. Stevens to adopt your testimony in respect to many questions asked by Mr. Ball which Mr. Stevens did not want to repeat, and you have done some amplification.

Now, I wonder if you would care to state whether you have any recollection—this is responsive to a question of Mr. Ball:

Do you have any recollection of any facts or figures you transmitted to Messrs. Taggart, Taylor, and Sawyer that either were not facts of record in these two cost studies, Bowman and Borden, or something that had been communicated to you by counsel for the defendants of their representatives?

Mr. Ball: I object to the question as not the best evidence of the facts, since the best evidence lies in the documents, including the written comments of Mr. Woolley, which you have refused to turn over to us for inspection.

By the Witness:

A. The answer is, to the best of my recollection, that is true.

[fol. 199] By Mr. Long:

Q. Mr. Stevens has asked you, and been gracious enough to preface his questions that they were hypothetical, with respect to these samples, with respect to the customer service.

Do you know, Mr. Woolley, whether there were any of these Bowman stores, independent stores, that were not shown to receive customer services on the days that——

A. There are stores that did not receive them.

Q. Do you know whether they later received or on other days received customer services?

A. That customer survey was conducted for some routes on one day only, on other routes on two separate days. Apparently a repetition. From the data that I have seen and studied on that survey, there were stores who did

receive the customer services on both of the sample days when they were taken.

There were others that received it only half the time, that is, on one of the days and not on the other. There were stores that received it on neither day.

On the routes that were sampled only once, there were [fol. 200] some stores that took it, that is, received it, and some stores that did not receive it. That is the nature of the survey that was made.

Mr. Ball: Is it understood, Mr. Long, that this last answer relates solely to the Bowman Dairy?

Mr. Long: Oh, yes.

By Mr. Long:

Q. Did any of the data show the time involved in serving a store which was served only, say, once on a sample day and not served at all on another sample day?

A. The data they collected was the number of units delivered on the day that the survey was being made to the store and recording the amount of time it took to perform that customer service to the store when it was performed.

Obviously, for the record of the stores that did not receive it, they merely collected the number of units for other purposes, of course, but, of course, they made no recording of the customer service because it was not performed.

So the time shown reflects only those stores—is reflected only for those stores for which the customer service was [fol. 201] actually performed.

Q. Now, do you know out of that group of stores that the sample did not show received the customer services on either day of the survey, do you know whether the services were made available to them?

A. No, I do not—that is, as an alternative you mean?

Q. Yes.

A. No, I do not.

Q. You don't know that?

A. It was not revealed to me in anything I saw in the cost information that was presented by their documents.

Q. Your answer would be the same for Borden?

A. The same for Borden.

Mr. Ball: What do you mean?

The Witness: That these customer services, as I understand it—I have no information from either of you as to whether or not these stores were advised that they may or may not have received this customer service.

Mr. Stevens: Are you through?

Mr. Long: Not yet.

[fol. 202] By Mr. Long:

Q. Mr. Woolley, do you recall from either the Bowman or the Borden cost study whether the chains, the units of the chains were offered the customer services or not?

A. My understanding is, according to Bowman's declarations in their cost study that they were not, that is, as specific instructions they were told not to approach the matter.

Q. What is your recollection of the Borden cost study?

A. I think it is the same in Borden's, if I remember correctly. I am not too sure about the latter, but it is my impression.

Q. You are not certain whether there were costs that were allocated to the chains in reference to customer service in the Borden case?

A. Oh, in the Borden? In the Borden there were some allocations which implied that some of the chain stores did receive then. Which ones they were, I don't know.

Q. Do you know whether the others were told of the availability of the services?

A. No.

[fol. 203] Recross-examination.

By Mr. Ball:

Q. I don't understand your reference, Mr. Woolley, to what the Borden survey showed. Do you have reference to data sheets, or what information?

A. Well, on your summary tabulations where you list the individual work elements and show their allocation across the page into the various class of customer, there are certain of those items—Now, when I use the terminology "Customer Service," I am using Bowman's definition.

Some of those items which they term as customer services are also identified separately and allocated separately by you. I observed that a few of those—I can't offhand name them but probably could point them out—appear to be allocated to the chain stores along with——

Q. But what I am getting at is, you do not refer to any facts that you understand from any data except that which is already tabulated and included in the pretrial order already entered?

A. Oh, that is right.

Mr. Ball: That is all.

[fol. 204] Recross-examination.

By Mr. Stevens:

Q. May I ask you this on a general subject, Mr. Woolley. More or less as a statistician, if you have a service element, such as customer service, and if you had a situation in which there was a substantial group of stores which took the service, for example, every third day, but not necessarily the same day, not necessarily every Friday; some took it whatever day it was convenient for the driver or customer, and you took a sampling of that group of stores, would you expect to find that about a third of them would show up as taking customer service on the day which the sample was taken?

A. I am not sure about the particular ratio, but——

Q. I'm not trying to pin it down precisely, but there would be a substantial number?

A. Let's put it this way. If you had a total population representing all the days of the year in which deliveries were made reflecting all stores, and these stores had either regular or irregular reception of the service, scattered through the year, you would expect a certain proportion of those to be represented in your sample if your sample is drawn in such a way as to obtain a representation, adequate [fol. 205] representation.

Q. Now, the data which you did examine in the Bowman time study, I take it that is not inconsistent with the hypothesis that there are a substantial or substantially all the Bowman customers took customer service on at least

some day with varying frequency, all the Bowman independent customers, of course, I mean?

A. Well——

Q. I appreciate what you have said before.

A. Well, if you consider anywhere from 25 to 70 per cent of the customers did take it all the time, which would be an average of around, say fifty, as a rough guess, as substantial, I suppose that would be true.

(Discussion had off the record.)

Mr. Stevens: All right, Mr. Woolley, thanks very much.

(Whereupon the deposition hearing in the above-entitled cause was continued sine die.)

[fols.205a-205b] Notary public's certificate. (Omitted in printing)

[fol. 205c] Stipulation as to signing depositions (Omitted in printing.)

[fol. 1] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 51 C 947

UNITED STATES OF AMERICA,

vs.

THE BORDEN COMPANY, ET AL.

The Deposition of Albert Joseph Bergfeld, taken before Paul A. Ruhe, a notary public in and for the County of Cook, State of Illinois, on Thursday, September 6, 1956, commencing at 1:00 o'clock p.m., at Room 754, U. S. Court House, Chicago, Illinois, pursuant to instructions by the Court in the above entitled action pending in the above named court.

PRESENT:

Mr. Earl A. Jinkinson, Mr. Bertram Long, Mr. Elliott B. Wooley appeared on behalf of the Government;

Mr. Edward L. Hart, Jr. and Mr. John T. Stevens appeared on behalf of the Defendants, Bowman Dairy Company and Ridgview Farms, Inc.

[fol. 2] COLLOQUY

Mr. Jinkinson: I assume we agree, Mr. Hart, that this deposition is being taken pursuant to the instructions of court?

Mr. Hart: Yes.

Mr. Jinkinson: It constitutes cross examination of your expert who made the cross study submitted by Bowman?

Mr. Hart: Well, I don't know that I will stipulate to that. I will stipulate it constitutes discovery, in connection with the submissions. I think the Court had pointed out that the actual cross examination, in so far as you were not willing to agree to the stuff after the discovery was to be held before the Court.

Mr. Jinkinson: Is that it?

Mr. Hart: I think that is it. I have got a transcript of that.

Mr. Jinkinson: Well——

Mr. Hart: —around here. I checked that just after you called me about this. I think I have got the pages marked that cover it. Yes, that is it. There is a prior one that I have marked where we discussed the same thing.

Mr. Jinkinson: It really amounts to cross examination and redirect examination?

[fol. 3] Mr. Hart: It was argued to me and to you to who ever was here on your behalf. I am not certain you were here that day.

Mr. Jinkinson: No, Kerr was there.

Mr. Hart: Here is the same general scheme of things in the prior hearing.

Mr. Jinkinson: The understanding was we were to take Mr. Bergfeld's deposition for discovery here and that you will make no examination when we get through here?

Mr. Hart: I think that is right.

Mr. Jinkinson: And that you will make a further examination of him when he is presented, if he ever is, on behalf of the defendants?

Mr. Hart: No, I doubt very much if I will make any examination of him at that time, assuming we stipulate to the material contained in the various studies that we have submitted. Except for the conclusions, why I would not make any direct examination but, as I understood it from both you and Mr. Kerr, you wanted the right to cross examine him in reference to his conclusions and it was that part of it that I was talking about in these two transcripts.

Then, the Judge in that last one, in talking to you,—this is the transcript of 6-15-56 and I am reading from pages 14 [fol. 4] and 15.

We were discussing the fact it was unfair to make the submissions to you and then not have any opportunity to prepare the particular points that you wanted to take up by way of cross examination.

And then you said: "Is this in connection with taking the depositions?

"The Court: No, no. The field is open on depositions. This is Court time."

Mr. Jinkinson: Yes.

Mr. Hart: "On depositions. The sky is the limit. How can you be prepared to say what you will stipulate to?

"Mr. Jinkinson: We will make this statement after we take the deposition.

"The Court: Certainly, certainly. This is a cross examination before the Court."

Mr. Jinkinson: Then the status of this matter here is that you have submitted these certain studies to us. We have not as yet agreed as to the validity of them. We are testing the validity of them here to determine whether or not we will eventually agree to the cost studies.

Mr. Hart: Yes.

Mr. Jinkinson: I see.

[fol. 5] Mr. Hart: In addition to that you will have the right to cross examine him before the Court and I would have the right to examine him on redirect.

Mr. Jinkinson: Well, the examination at this time will be confined to the four studies that you have submitted which have been marked for the purpose of identification as Defendant Bowman's Exhibit 1. That is entitled "Manual for Establishing and Testing Store Discount Schedules." And that the Defendant Bowman's Exhibit No. 2 is the discount schedule Test marked 1955; and Defendant Bowman's Exhibit 3 is a cost and price study of certain bulk wholesale customer transactions, plus the supporting data heretofore submitted by Bowman Company in support of Bowman Exhibits Nos. 1 and 2.

Mr. Hart: There are two additional ones that we have not mentioned, one dated November of '55 and the other dated November of '56.

Mr. Jinkinson: I don't think at this time that we are going to go into the two additional ones we have marked at this time. In checking the record we find out that——

Mr. Hart: Then, 1 is your basic manual for this purpose.

Mr. Bergfeld: 2 is the discount test.

[fol. 6] Mr. Jinkinson: Discount test.

Mr. Hart: Discount test of what date?

Mr. Jinkinson: March of 1955.

3 is the cost and price study of certain bulk customer transactions of March, 1956.

Mr. Hart: Restaurant.

Mr. Jinkinson: Yes. Then in addition we are going to use the supporting data which you furnished us on May 17, 1956.

Mr. Hart: That is the collective board.

Mr. Jinkinson: Well, we have numbered all of them. They go from 4 to 8.

Mr. Hart: 4 to 8.

Mr. Jinkinson: Yes, and these are subsidiary numbers for the different sheets.

Mr. Hart: Earl, there is just one thing: This isn't one that you said you were going to talk about now but this does bracket the discount plan which we have submitted.

Mr. Jinkinson: Dated what date?

Mr. Hart: Dated, discount plan dated December 26, '55.

Mr. Jinkinson: Yes.

Mr. Hart: Also dated as November, '55, on the actual letter of transmittal that is contained in there it has November 20, 1956. That should be November 20, 1955. [fol. 7] I thought we better correct it before we pass November.

Mr. Jinkinson: All right. We are probably going to. Here, it is November, 1956.

Mr. Hart: We are probably going to.

Mr. Jinkinson: Have to have Mr. Bergfeld back for examination.

Mr. Hart: That is perfectly all right.

Mr. Bergfeld: It is your numbers 1, 2 and 3.

Mr. Jinkinson: Yes. In checking the record we find——

Mr. Hart: I will tell you, that isn't going to work out with our exhibit numbers.

Mr. Jinkinson: Do you have some exhibit numbers already set up?

Mr. Hart: Yes. Use it as 1, 2 and 3 and 4 to 8 of this date. We will number them back on the basis of the other exhibits we have gotten because in that stipulation that we submitted to you why we have numbers that run up to 15, I think, already.

Mr. Bergfeld: Your No. 1 would have been that No. 6.

Mr. Jinkinson: Let us then identify these as Bergfeld Exhibit No. 1.

Mr. Hart: That is fine.

[fol. 8] ALBERT JOSEPH BERGFELD, having been first duly sworn, deposeth and saith as follows:

Cross-examination.

By Mr. Jinkinson:

Q. Please state your name.
A. Albert Joseph Bergfeld.
Q. Where do you reside, Mr. Bergfeld?
A. Stamford, Connecticut.
Q. Incidentally, Mr. Bergfeld, before proceeding further, you will waive the signing of the deposition?

Mr. Hart: Yes.

By the Witness:

A. What do I just waive?

By Mr. Jinkinson:

Q. The signing of the deposition. After it is taken and typed you have the opportunity to read it if you so desire.
A. Yes.

Mr. Hart: With the understanding that if we find some errors in the thing we will just arrange by calling with you to correct it.
Mr. Jinkinson: Off the record.

(Discussion had off the record.)

By the Witness:

[fol. 9] A. I did not quite understand what I waived.

Mr. Hart: All you waived is that ordinarily the reporter has to transmit the deposition to you and have you examine it and then you have to acknowledge it before a notary public and so on that that is a true and correct transcript.
The Witness: I understand.
Mr. Hart: Now, all we are saying from a procedural standpoint we will achieve the same thing without all that formality.
The Witness: If that is the preference of you gentlemen I will accommodate you.

By Mr. Jinkinson:

Q. Did I ask you where you resided?

A. Yes, Stamford, Connecticut.

Q. By whom are you employed?

A. Stevenson, Jordan & Harrison.

Q. What business is Stevenson, Jordan & Harrison in?

A. They are in the business of management engineering and consultants.

Q. As such you make studies similar to those submitted and identified as Bergfeld Exhibit 1 which I believe you have before you?

[fol. 10] A. I do and I have.

Q. Have you made similar studies for other industries?

A. There are always some differences among our studies but if I may answer you in general, yes.

Q. Then you have made studies which can be designated as cost justification studies in other industries?

A. As cost justification other than the Robinson-Patman Act?

Q. Yes.

A. No.

Q. This is the only one you have made?

A. That is right, only in this instance.

Q. The only one that you have personally made. Do you know whether or not your firm has made such studies?

A. That I would have to check.

Q. As far as you are concerned this is the only one you have made?

A. I have participated to some extent years ago in a somewhat similar study.

Q. What was that study?

A. Morton Salt.

Q. Morton Salt?

A. Yes.

Q. Have you made any similar studies just such as Berg [fol. 11] feld Exhibit No. 1 with respect to other dairy companies, either in Chicago or in other cities?

A. For Robinson-Patman?

Q. Yes.

A. Trial purposes?

Q. Yes.

A. No.

Q. When were you or your firm first employed by the Bowman Dairy Company to make the study reflected in Bergfeld Exhibit No. 1?

A. Let me go back to your previous question. I am answering that in terms of material actually to be used for litigation under the Robinson-Patman Act?

Q. That is right.

A. Is that what you want me to answer?

Q. That is what my question was.

A. I am differentiating here carefully, I hope, to your satisfaction because frequently for matters of internal managerial policy we make these studies and this is to my knowledge in the milk industry the only case in which such studies have actually been for purposes of submission of depositions in the case. Excuse me. Your last question I am afraid I have forgotten.

Q. My last question is: When were you or your firm [fol. 12] employed by the Bowman Dairy Company to make the study ultimately reflected in the Bergfeld Exhibit No. 1?

A. My first work for the Bowman Dairy Company, although not directed specifically toward your Exhibit 1 at that time but that work at that time did provide some of the background ultimately to be used in Exhibit 1 in about 1947.

Q. 1947?

A. Yes.

Q. Do you remember the time, approximately?

A. Yes, I think. Do you mind if I refer to notes on that?

Q. Yes.

A. Bob, do you have—I believe it was about October, '47, as our billings appear. That might mean that somewhat previous to October but billed in October as our records show and this is a little bit beyond the length of time that the records are kept in great detail, about October of '47.

Q. Now, to your knowledge, were you the only one from your firm who had charge of the work which ultimately resulted in Bergfeld Exhibit 1 or was there someone previous to that who came out and did work for the Bowman Company?

[fol. 13] A. Not to my knowledge or not to my memory I should say. I think that at one time or another others of my associates had talked with the Bowman Dairy Company. You see the period is a little hard for me to say who and

when and to what extent it wasn't of my then concern. It might have been been during my Navy turn of service.

If you want a precise answer to that I would like to check it. There might have been some of my associates do something during that period of time I didn't know.

Q. You didn't know about?

A. That might be that someone of my associates or staff.

Q. But if your associates were here, do you know whether or not they were engaged in the type of work which ultimately resulted in the Bergfeld Exhibit 1?

A. If I can give you an opinion on that?

Rather than have you accept it as a matter of fact I would say that I would doubt that. Had any of my associates worked with Bowman Dairy Company in advance in '47, my opinion, my judgment would be it was not directed towards Exhibit No. 1.

Q. You did some work in 1947. Can you state whether [fol. 14] or not it was the type of a matter which resulted in Bergfeld Exhibit No. 1 or was it a different kind of work?

A. No. It was not—it was a kindred work. I haven't come—I have not come with a break down or a log of just what each of these assignments were. There have been many since October of '47.

Q. What are some of those other assignments other than your cost justification study?

A. When you say other than the cost justification study, they were really all related. For example——

Q. What I am trying to differentiate is any work done of the nature of an engineering study which resulted in internal improvement in the method of distribution of milk which I am not particularly interested in.

You say you are an engineering firm. I assume that you make studies of the method of operation of the Bowman Dairy Company looking towards possible suggestions in improvement in distribution. I assume that would have no effect upon your justification, cost justification study?

A. No, sir. That is why I am having to answer you pretty carefully. The same techniques of measurement, the estab- [fol. 15] lishment of standards for things to be done are fundamental to working out methods of improvement, to working out better internal cost controls as we call it. If

you will they are the same fundamental element that we give, irrespective of their end use.

Mr. Hart: Well, if I can interrupt just a minute, I think I can clear it up, what Earl is talking about, off the record.

(Discussion had off the record.)

Mr. Jinkinson: Getting back on the record:

By Mr. Jinkinson:

Q. Is it fair to say you did make some studies which ultimately resulted in your determination that all platform costs to all classes of customers were the same? You used that as the basis for that premise in Bergfeld Exhibit 1, is that right?

A. Not quite. The principle on which Exhibit No. 1 is based, among others, is that the kind of costs, technically speaking, to be used here are standard costs rather than actual costs, and are predictive standards instead of actual costs.

There are two kinds of general costing practice that have been used one way or the other in industry. There are three or four but there are only two that I think ever have been [fol. 16] tried at Bowman's. One is to wait until after a period of accounting has been closed and then to go back and refigure costs of products on the basis of what expenditures, payrolls and so forth were incurred for that actual segment of production for that accounting period.

That is the cost principle, a cost philosophy that was fairly prevalent throughout most of the industry. I would say more prevalent throughout most of the industry in the early '20's than it has been in recent years, because it was a post-facto kind of thing. It was of less use to management than the cost principles that we have worked with in No. 1.

There what you do is to determine the cost of your individual products on the basis of the methods and the cost that should be incurred when the operations are being properly controlled and managed. So the products then, under these standard costs and calculations and principles don't have attached or assigned to them a lot of chance costs. For example, breakdown costs or something springing a leak and delay. All of those things are standardized in the standard cost approach.

Now, the advantage of that is, of course, obvious; that [fol. 17] you begin to say what your product should cost you if things are well handled.

And then you can start in advance to work out some of your policies but if you have to wait until after the close of September's books until sometime late in October or early in November, to get your actual cost to know what you——

Q. Should have been doing?

A. —should have been doing before, is the principle that is fundamental in here. So that it isn't just a matter of the cost studies previous to the immediate work on Exhibit 1 being a matter of determining whether or not all products cost the same at the platform.

That was not the primary objective. The objective was to try to get over onto what is considered to be a somewhat more useful and somewhat more modern concept for determining unit product cost.

Q. Did you accept the second method when you first started?

A. When we first came, as I remember, —this goes back to '47—when we first came their cost accounting philosophy was the post-facto type.

Q. The first type you described?

A. Yes. The first type I described when they took the [fol. 18] actual cost for the past period, they don't know up until too long in the period to get any good out of that.

Q. You attempted to correct that?

A. Well, I think one of the first things they asked us to do was to check certain—in those actual product costs through the plan was to check certain factors that they thought were probably inaccurate. I think there was still, as I remember the first assignment, and I will be very glad if you would like to have me make up a more detailed answer to this because I am depending upon memories as best as I can here.

Q. Do you have some record to refer to, some memoranda, or something you have written?

A. Well, again it goes back so far I don't know—I am sure I couldn't, couldn't promise you any specific document; but I think I can go back through probably notes or files and look for it, too. I am pretty sure that was no small part of our beginning with Bowman.

You see, we got all sorts of possible inaccuracies in an

average cost system and it periodically has to be reviewed and this was somewhat periodic in that sense.

Q. State whether or not, state who you first discussed the [fol. 19] Bowman problem with of cost studies.

A. I am trying to go back to the very first beginning for you. It seems to me one of the first people I ever met from Bowman was a Mr. Gullans. This is a long time ago. I believe he was—I can't remember whether Bowman agreed to this or not but it seems to me they were asked—yes, they did. This goes back before '47 on this particular point.

This was not for the Bowman Dairy Company. That is the technical difference between what I answered before and what I am answering now but you now ask me what was the first one I ever talked about these problems with at Bowman and that answer is this:

Before '47—I am sorry I do not have the date. Again I shall try to get it for you. I was asked to make a comparison of paper and glass costs. Well, the cost created by packaging and delivering milk in glass bottles as compared with packaging and delivering milk in paper bottles.

I was asked to do that by some members of the glass industry. And I believe my first discussion of costs with Bowman, with a member of the Bowman company management was in connection with that kind of a survey and we did make, not for the Bowman Dairy Company, but by their [fol. 20] courtesy they were used as an example and I am sorry I cannot tell you the exact date of that.

Q. That discussion had nothing to do with your cost studies?

A. I think it did in this sense: I think at that time Mr. Gullans was rather interested in these other principles of costing in his professional or his folks will. It was talked about. I think we talked about the various principles that one could use in dairy products costing. I think we did have an exchange of opinion, you know, as one will in an informal discussion between some of the problems he was having with the actual cost system and some of the things that might have been different if he were on a standard cost.

Q. Was anything said about cost justification under the Robinson-Patman Act?

A. Cost justification under the Robinson-Patman Act?

Q. Yes.

A. No.

Q. You really began your study, you made that study for the Bowman company, the first study that Mr. Gullans asked you?

[fol. 21] A. Mr. Gullans did not ask for that. Mr. Gullans was willing to be used as a guinea pig for us. That was not paid for by Bowman. Bowman didn't hire me for that. I was hired by glass manufacturers to go to Bowman and see if they would be willing to stand as an example for my calculations. This was pretty far back.

Q. Getting back to when you first went to work for Bowman, that was in October?

A. Yes.

Q. Who did you talk to first, October of 1947?

A. I don't remember exactly who was the first person I saw.

Q. How soon after?

A. I believe it would have been—again an opinion, if you don't mind, as best my memory serves me, I believe it was Francis Kullman. Is there any objection to my smoking?

Q. No. Well, how long after you talked to Mr. Kullman, or did it happen in the first conversation, was anything said with reference to your doing any work on cost justification for discounts granted the various classes of customers of the Bowman Dairy Company?

[fol. 22] A. As I remember it, not very long thereafter.

Q. What, in your best judgment, how long?

A. I am sorry to keep you waiting.

Q. That is all right.

A. I am trying to remember conversations, and these things, I mean, were, frankly, I was always anxious to see them consider the standard costing principles. I think I was tempted to talk about it any time and every time I was given a chance. That is why I am having a little bit of difficulty just when he first mentioned this to me. I think it must have been early in '48.

Q. Early in '48?

A. Yes.

Q. Now, did you know at the time——

A. Let me just say this: It must have been at least by the end of '48.

Q. At least by the end of '48?

A. That he came down to the specific—you are asking me about how do our costs rank among customers? That was your question?

Q. Yes. Were you aware of the fact at that time that the Bowman Dairy Company had a discount schedule in effect for its various classes of customers?

[fol. 23] A. Although my emphases were these cost problems, product and delivery both, I believe by late '48 or early '49 the relationship of these cost determinations to discount prices was discussed. And again I believe, I have no records that I can give you on that as a statement of fact.

Q. Let me raise the question this way: When were you first apprised of there being in existence a discount schedule for Bowman, the various classes of Bowman customers?

A. I honestly don't remember.

Q. Was it prior to the last part of 1948 or first part of '49, or was it at about that time?

A. I really can't remember just when. I am sorry.

Q. Having been apprised of that fact, the fact that they did have a discount schedule in effect, did you make any study personally of the existing discount schedule?

A. Yes.

Q. Well, what did you do?

A. I think we did.

Q. What did you do in connection with that study?

A. We determined—we went to the determination of searching out of these costs, these standards, these meas-

[fol. 24] urements.

Q. Did you arrive at any conclusion as to the validity or the legality of the Bowman discount schedule then in effect?

A. Well, I don't think that I have ever felt that I have arrived at a decision as to the legality. I think it is a little bit beyond my competence, frankly.

Q. I will phrase it another way: Did you ask the Bowman Dairy Company to show you these statistics or the supporting material which supported the then existing—when I say "then existing," I mean in 1948 and '49, the schedule then existing which supported that discount schedule?

A. Did I ask them to show me the supporting statistics and costs supporting that discount schedule?

Q. Yes.

A. I don't believe I did.

Q. So, is it fair to say then that you did not bother yourself with ascertaining whether or not the discount schedule as then set up was based upon any study made with reference to cost justification?

A. Well, these are memory exercises and are a little hard for me to put together. Let me say this:

Q. I appreciate that, Mr. Bergfeld. You appreciate also [fol. 25] I was not there.

A. Yes, sir. I appreciate that.

Q. Yes.

A. I—well, while we were talking of these standards as a philosophy and principle of costing, I had also as I think was somewhat generally known, been encouraging clients to consider the management advantages and importance of equity pricing. As is fundamental in this costing, these costing principles, were also many discussions of equity pricing as a management affair, as being good business.

Q. When you talk of equity pricing are you talking about discounts granted various classes of customers?

A. No. What I am talking about is this: In the long run it was one of my management philosophies that the soundest price structure to have between any buyer and seller was a price structure in which there was a somewhat uniform amount of margin between price charged and cost created, because, as a business principle I was interested and still am in the fact that if there are, from a management standpoint, serious overcharges or differences in those margins or charges that create a substantial larger margin on some customers than that margin which prevails among other [fol. 26] customers that it is bad business in the long run to have it be that way.

So, comparisons that were made at that time between their discount schedule and these costs that were then being developed, it is difficult for me to say to what extent I was interpreted as talking my equity price principle which I think is sound business and to what extent that is to be construed as a pure test of legality, because on the legal side I do not feel again, as I say, competent to do it; but there were those comparisons, as I remember it, in '47 and '48 between the amounts being charged and the cost being created.

Q. Do you think they went back as far as '47 and '48?

A. I think it is very possible that some of those figures may, oh, yes.

Q. Were you apprised of the discount being granted to the chain stores, and particularly the A&P in October, 1947, when you were first employed by the Bowman Dairy Company?

A. Was I apprised in 1947, October, 1947? I think I was, somewhere in '47 and '48, that is, I am having a little difficulty saying how was it first set and when was it set. I [fol. 27] think there may well have been, although I don't have those working papers with me. There might well have been some playing back of those figures into '47. I would think yes that it entered into the discussion. Whether it was an equity discussion or a matter of legality I don't honestly remember.

Q. Well, the record in this case shows that in 1947, at all times in 1947 and during the time you first became employed by the Bowman Dairy Company, discount granted A&P 11 per cent.

A. Yes.

Q. 11 per cent discount continued through 1948 up to March 7, 1948, at which time a discount was dropped to 3½ per cent.

My question is this: Were you consulted with reference to the change in the discount from 11 per cent to 3½ per cent and if so, with whom did you consult and what did you recommend or state with reference to the change of discount which occurred on March 7, 1948 from 11 per cent to 3½ per cent?

A. During that time these principles of equity pricing were being talked about and these cost determinations were being made. Just what the specific ones were at each one [fol. 28] of these dates I don't know. I don't remember any direct questions about the 3½ per cent discount as to whether or not I thought it was the right amount.

Q. Did you have any—did you make any—go ahead.

A. But it has always been my role with them to develop these facts for their consideration and I think it is also fair to say that those facts developed have always been a part but by no means the only things considered in deciding the courses of action and I don't remember of any literal rec-

ommendation to them that the discount schedules should be changed in any particular case at that time.

This particular thing, back in '47 and '48, where they literally, literally said "We shall follow exactly what you say." I do not know the extent to which my judgments and calculations have led to that or any other change in the discount.

Q. Am I correct in my understanding then that your duty was to make the studies, furnish them to the Bowman Company, and they were to make the decision whether or not the discount schedule moved up or down or changed?

[fol. 29] A. Yes, my role was purely advisory.

Q. All right. Can you recall any studies you made between the 11 per cent discount which was changed on March 7, 1948? Do you recall any studies you made and presented to the Bowman company which was a basis for their action in changing the discount from 11 to $3\frac{1}{2}$ per cent at that time?

A. Well, at this sitting I can't remember anything quite as formal as you are asking in the questions. The difficulty I am having in answering you precisely on this is that these were constant discussions that have always gone on between myself and a client and the facts were developed from time to time and we would have meetings and discussions.

More frequently than that they were not formalized in the specific written reports. They were very often not written up in that form simply because of the time or delay that would be involved. They were discussed and then, therefore, the discussions were so many——

Q. In putting——

A. I don't—I can't remember all of them and I don't remember how many of them got formalized into specific [fol. 30] reports and recommendations.

Q. Putting it another way then: You can recall making no such study as you later made and as is reflected in the Bergfeld Exhibit No. 1?

A. I can recall no equally formal printed study as comprehensive as that.

Q. Can you recall any similar study, that is to say, any study whereby you sent foremen or trained personnel out to clock the stops and the various drivers at chains and independents which was ultimately used as the basis for

making a report which was used by the dairy company in changing the discount from 11 to 3½ per cent?

A. Oh, time studies were taken way back there in '47 and '48. If I say '47 it was early '48, back in that early period. Time studies were taken by supervisors.

Q. Were these—I will withdraw that question.

A. I think in there we say that.

Q. Bergfeld Exhibit No. 1, you have it. Bergfeld Exhibit No. 1, not that I don't want to show you this, I am reading it myself.

A. That is all right.

Q. Bergfeld Exhibit No. 1.

[fol. 31] The Witness: Bob, will you see what reference, and if there is no reference here as to the time when some of these time studies were taken here in '47—I think it will be one of these pages.

By Mr. Jinkinson:

Q. This is my next question. Maybe I can straighten this out. I know that Bergfeld Exhibit No. 1 is not dated or if it is dated I have not been able to find a date.

When it was prepared, can you state the time that Bergfeld Exhibit No. 1 was prepared?

A. Bergfeld Exhibit No. 1 is a compilation of these principles developed over a period of time.

Q. Well——

A. And some of the time standards in it I am sure go back as far as '47. Let me say the early periods of '47 and '48 or late '48.

Q. All right.

A. I am having to remember a little bit from the names of the men I had on the job and what they did. So I think——

Q. I refer you now to page 9.

A. Yes, sir.

[fol. 32] Q. It is acceptable time standards?

A. Yes, sir.

Q. As the first requisite, standards derived by conducting time studies for deliveries and so forth?

A. Yes.

Q. When were those time studies made which appear all through Bergfeld Exhibit 1?

A. Well, I think, as I remember it, the earlier periods of '47 and '48 time studies were made and that is right. The list will probably show that. I don't have the list in front of me.

Q. I may have been misinformed with reference to it. I thought they were all made in 1949.

Mr. Hart: '48 I think.

By the Witness:

A. You see they were done over a period of time, some of the original ones getting—when you take a time study particularly—the two things you have to watch, first of all you don't introduce into the environment of the person being observed a lot of confusion and upset that will defeat the thing that you are trying to measure. And as I remember it there were some practice time studies when the people assigned to the time study were obviously having to go through a training period. Then, I think there were more [fol. 33] studies later that were made by those same people.

By Mr. Jinkinson:

Q. Of course I am in error with reference to the position of the Bergfeld Exhibit No. 1 but it was my impression the time studies were all made on one or two days.

A. That is right, some years back.

Q. Yes, some years back. But now you have not included in the Bergfeld Exhibit 1 what practice runs you made, have you?

A. No. I think in Exhibit 1 we have not included any time studies as such. We simply included in Exhibit 1 the standards developed from the figures gathered on the time studies.

Q. Yes, but those time studies, as I understand it, were actual time studies made on either one or two days?

A. I don't again remember the number of days but I think Mr. Wooley does.

Mr. Hart: I think that is right. I think it was March 18th and 19th, 1948, if I am not mistaken.

Mr. Jinkinson: March——

[fol. 34] Mr. Hart: 1948, if I am not mistaken. I am checking my memory from something I saw.

By Mr. Jinkinson:

Q. I am trying to find out if you trained your personnel, gave them a trial run when you actually came to gathering these statistics for the basis of the time studies that constituted your basis, is that right, for your time studies in Bergfeld Exhibit 1?

A. It constitutes the basis for the time standards.

Q. To the best of your memory, when were you instructed by Bowman Dairy Company to compile Bergfeld Exhibit 1?

A. I don't think I can give you any single date on that. Each one of these, as I say, each one of these ideas, propositions, principles and techniques were developed with them over a period of time and this represents a compilation of over several ygars of working with them and compiling together, if you will, of the various techniques that individually have been in one way or another applied to many of their problems over a period of several years.

Q. Well, referring now to Appendix A, page 1.

[fol. 35] A. Yes.

Q. Of Bergfeld Exhibit 1.

A. Appendix A?

Q. Page 1.

A. Yes.

Q. The title of that page is "Standard Time Allowance From 1949 Time Studies"?

A. That is right.

Q. I assume there were no previous time studies included in this exhibit, Bergfeld No. 1, other than the time studies made in 1949?

A. I think that is right.

Q. In other words these practice runs and these other statistics you gathered were not the basis for this exhibit, Bergfeld Exhibit No. 1?

A. No, sir, I don't think they are. These actually, even back in the time when we were settling that glass paper problem, we made some time studies.

Q. They were not included in Bergfeld Exhibit No. 1?

A. I think these are from the 1941 time studies.

Q. When were you told to prepare it? Do you recall?

A. Is this by——

Mr. Hart: Are you speaking of putting it together in this form?

[fol. 36] Mr. Jinkinson: Yes.

Mr. Hart: In a book form?

Mr. Jinkinson: That is right.

By the Witness:

A. I can't remember just when we were asked to do that, honestly.

By Mr. Jinkinson:

Q. Were you ever at any time instructed to make a cost justification study?

A. As such, no, I think that when you say were we instructed to make a cost justification study I don't think we ever had instructions like that. I think we did have instructions to analyze the cost created by various customers and compare them with prices charged various customers to determine if there were inequities but I can honestly say that I don't think I was ever told to study to justify.

I think we were told to study, to analyze and to determine.

Q. Did you compile Bergfeld Exhibit No. 1?

A. I and my men compiled it.

Q. It was compiled under your direction?

A. That is right.

Q. It is undated as far as I can see.

[fol. 37] Q. Will you tell me when it reached this form in which it is submitted here?

A. I will have to look it up for you. I honestly don't know. It was done—it was done a part of the time.

Q. That is right.

A. Past information was drawn on for it and just when it all went together in this form I really don't know. I will try to look it up. I don't know of any recording, to my knowledge, but as of this date, pages from beginning to end were finished. I don't know of the recording of that. All I have——

Now, is there —I mean, is there some other way I can try to accommodate your inquiry? As far as the principles concerned here, as far as the ideas, as far as the concepts are concerned, those were going on during all of this period.

Q. Were other information or other statistics drawn upon in compiling this book that do not appear in this record or Bergfeld Exhibit 1, and if so, what kind?

A. On time standards we have a fairly broad frame of reference, having studied quite a few deliveries and in quite a few cities a few companies for many different types of [fol. 38] distribution. And we were constantly, whenever we got these time standards through, referring back for comparison with other similar time facts that appear here. We have made these breakdowns of elements. I think in total we have done something over a hundred in one way or another, working for over 100 milk companies.

Q. You don't mean to say, and I don't understand you as saying, I hope, that statistics or information gathered in other cities or in other companies were used as the basis in Bergfeld Exhibit 1?

A. No, to my knowledge we never altered whatever actually showed up in the Chicago readings, but we made the most use, as we do in all studies of any comparative data we can bring to bear on an analysis and we did, I am sure, reviewed the time values arrived at here in Chicago to be sure they were in range of other experience; but to my knowledge none of the figures from Chicago studies were altered.

Q. What you found in other cities and in other companies did not have any bearing upon what you actually found in the Bowman company?

A. Oh, yes, sir, they would have- you say a bearing. They would have a usefulness.

[fol. 39] Q. In what respect?

A. Well, where we have exactly a similar element, a time to pick up a case, and load it into a truck, the time to drive a mile under various conditions, customer density, are all physical measurements which whenever we can we make them just as right as we can because if they were glaring inconsistencies we would have had to ask for more studies to either explain the inconsistencies which very frequently

is done or, when I say inconsistencies I am not saying direct comparisons—or to find the reason for.

Q. In other words, as I understand you, what you are saying, if you made some similar study for milk company "Y", and a similar study for Bowman, which didn't come out anywhere near the same, you would make a further study?

A. That is right. We would have to have some reason why there were great differences.

Q. Yes. I would assume first your study of company "Y" was correct and the Bowman study was incorrect?

A. No, we couldn't do that.

Q. If you had five or six companies?

A. No, having, frankly, quite a few thousand individual readings on some of these elements, statistically we make [fol. 40] the most use of the information. You see this technique that we have in manual one, I think I must make this clear, was not invented for any immediate purpose of the Bowman Dairy Company. It was an application to the Bowman Dairy Company of standard cost and standard measurement technique that had been and are still being developed in the other studies we made.

So what you see here in the way of a technique in manual one is the application of a methodology and a technique about these measurements and these standards that we have been carrying on in one way or another in the last, oh, I would imagine, fifteen to sixteen years.

I should have pointed that out earlier, that these methods in manual one are somewhat orthodox methods, not only in the techniques of breaking time down into elements as we have got it here, fixed, variable and mixed, you know. That is a fundamental technique of time study applied and I didn't come prepared with some of the bibliography on this point. This is a fundamental technique of time study and time measurement.

Q. Would you say it was standard, used by every engi [fol. 41] neering firm or accounting firm?

A. Oh, I don't think it is confined—let me say standard. It is recognized practice.

Q. In your field?

A. Yes, breaking jobs down into elements and study standards for them.

Q. I am talking about the method you did.

A. That is the method, sir.

Q. This is the method which is standard by all companies, used by all companies, engineering companies?

A. Well, I can't say it is standard because standard to me is sort of a—has sort of a definitive meaning. I would say it occurs with significant frequency among, not only engineering companies but among individual private companies in their pursuit of these same cost standards. I mean, I would be willing to hazard a guess that many of the individual companies here in Chicago have time study departments who would recognize the breaking of the job down into its elements, according to variable, fixed and mixed and so forth.

As a technique at least they have considered it. Some of them may not use it. There are all sorts of other ways for [fol. 42] measuring this time and as you know, there are camera techniques and there is another way of measuring time which is built up. This I am sure I should have mentioned. You just build up from a universal set of time data that have the elements broken down into very fine where they will give you the time for moving your arm through an arc of so many inches.

What they do, they start with those smaller parts, even more universal everywhere times and build up their time values by that technique. These varying techniques are a matter of applying to the problem the one that best fits. If you have very minute assemblies, for example, you probably could build them up from some of these universal time tables.

These techniques were not anything that were invented for or by the efforts of the Bowman Dairy Company but were applied to their problem.

Q. Getting back to the discount schedule at Bowman Dairy Company——

A. What date, sir?

Q. Between March 7, 1948 and June 1, 1949, the discount remained the same at the A&P Tea Company at 3½ per [fol. 43] cent.

Now, on June 1, 1949, it was changed to 6½ per cent.

A. Yes.

Q. Can you recall any time study or any studies you made or any cost studies you made and submitted to Bowman Dairy Company which they used in their evaluation of changing the discount on June 1, 1949 to 6½ per cent from 3½ per cent?

A. I can recall that during that period we were making many studies for the Bowman Dairy Company. The period I am speaking of now which appears on my accounts is December, '48 through August, '51.

Q. Do you recall any particular study made at that time? If so, do you still have it, or a copy of it?

A. I haven't it with me and if there were any formalized reports made I believe I can find them.

I think that if would be better, if you are willing, than relying upon my memory.

Q. Yes. Will you send them to us and produce them for inspection?

A. May I be sure now? Any formalized written reports, as I understand it, Mr. Jinkinson, between December, '48 [fol. 44] and August, '51?

Mr. Hart: March 7, '48.
Mr. Jinkinson: March 7, '48.
Mr. Hart: To June 1, '49.
The Witness: March, what?
Mr. Jinkinson: March 7.
Mr. Hart: March 7, 1948 and June 1, 1949.
The Witness: March 7, '48.

By Mr. Jinkinson:

Q. And June 1, 1949.
A. And June 1, 1949?
Q. Yes.
A. Any reports, Bob, that we have made during that period, irrespective of what they relate to?
Q. No. I want them to relate to the change in discount granted by Bowman.
A. Let me look at all of them because as I say——
Q. You can look at all of them. All I want are those. I do not want all. I just want those.
A. All of these things are so inter-related I do not know if I can pull them apart. You see, my point on inter relation?

Q. Yes.

A. I mean it is just a matter of bricks and boards. You [fol. 45] use them in building various things, as you are asked to.

Q. Now, in the training——

Mr. Jinkinson: I will withdraw the question.

(Recess taken.)

By Mr. Jinkinson:

Q. Mr. Bergfeld, on page 9 of Bergfeld Exhibit No. 1——

A. Yes, sir.

Q. You say that, "As route foremen are familiar with normal methods and sequence of operations required to make delivery to stores, several were selected and trained in the procedure of recording time observations."

Were they trained by you or under your supervision?

A. By my staff.

Q. Your staff consisted of Mr. Havemeyer and other men?

A. I do[illegible]elieve Mr. Havemeyer was there at that time. It was n[illegible]r. Havemeyer. Just who it was I don't think I have as a matter of record because there have been different men worked for and with me here at Bowman.

[fol. 46] Q. All right.

Did you have anything to do with the personal supervision of the stop watch studies conducted by the Bowman employees?

A. I instructed the man who instructed the Bowman employees.

Q. And all the basic data used for Bergfeld Exhibit No. 1 was gathered by Bowman employees and not by your organization, is that right, but under your direction and supervision?

A. That is, as I remember it. There may have been some fragmentary exceptions but I don't remember any so I think probably—I would like to go back to a question on this particular point that you asked earlier.

Have we ever done any other studies regarding cost and price? I think I was interpreting your question to mean specifically Robinson-Patman milk cases.

Q. That was, of course, my question, also. I assume that was the answer.

A. That is right, we have done price-cost studies for other public agencies. For example, the State of Connecticut [fol. 47] asked us to make a study for them as to what prices should be charged by the State Regulatory Body because at that time they had in the State of Connecticut a price regulation for what could be charged for the resale of milk to stores and to consumers and this same technique that you see here on the establishment of time standards and the breaking of the day down into elements of work and of services performed, broken down into elements, that whole concept of plant standard cost, delivery standard time, and their related cost, has done a part of work in Connecticut and other places where State Regulatory Bodies were putting together a price structure that they felt was right for the industry. Whether or not in the back of their minds was any Robinson-Patman intentions, I don't know; but I have made several of those for various, and again, these same techniques were among those that——

Q. Getting down to this specific question, did you or did any of your men, that is any men under your supervision from your office, accompany any of the Bowman employees in their stop watch studies?

A. I don't believe they actually rode the trucks with the men; I think they did, however, as I remember it, meet them [fol. 48] en route to see how they were getting along.

Q. As far as you know none of them went into the store with the men who were actually making the stop watch studies?

A. Well, I don't know that they didn't go into the store. That is the best way for me to answer. They may have because our attempt was to instruct them as completely as possible.

Q. My understanding is that you say you don't know whether they did or whether they did not?

A. Go into the stores?

Q. Yes.

A. I don't know.

Q. Mr. Bergfeld, did you, or did you instruct anyone under you, to make a study of the method of delivery to chain stores?

A. I instructed men working for me to find out from Bowman employees the services rendered to chain stores.

Q. Well, from that study do you know whether or not milk sold to chain stores is delivered to the various stores and units of the chain store or whether it was delivered altogether at a central receiving station of the chain store? [fol. 49] A. From the information provided us by Bowman employees it is my understanding that individual store deliveries are made rather than central, what I would call central warehouse deliveries, which is, I believe, what you mean.

Q. Yes.

Were any studies made as to any difference between the total number of units delivered to chain stores versus units delivered to independent stores?

A. Studies were made on several occasions to determine the specific units of delivery.

Q. To chain stores versus independents?

A. To chain stores and independents.

Q. Did you find in that study some independent stores were taking as much milk as chain stores per store? That is, as many units per store as chain stores were taking?

A. Again we are talking about lots of studies.

Q. Talking about any study you made on that proposition, whether or not you discovered that some independent stores were taking as many units as some stores of the chains?

A. Yes, I believe the studies did reveal that some chain [fol. 50] stores were taking as much volume as some independent stores.

Q. And vice-versa, some independents were taking as much as some chain stores?

A. That some independents were taking as much as some chain stores?

Q. Yes. Now, did you make a study of the method of sale of milk to independent stores?

A. Well, you will have to help me understand what you mean by the function of sale. You see, sale is a fairly general term in our parlance.

Q. Referring to Schedule 6.

A. Yes.

Q. In Bergfeld Exhibit 1.

A. Yes, sir.

Q. There is an item included under salaries and wages as solicitors' wages.

A. Yes, sir.

Q. What does that refer to? What is that item?

A. My understanding from the client on that item is that solicitors are men who are out promoting and selling the product but are not involved in the actual delivery function of the product except as it may be incidental, sample-wise to the promoter. That was my understanding.

[fol. 51] Q. Did you further understand that the solicitors' wages listed in Schedule 6, Bergfeld Exhibit 1, is not applicable to independent stores only or is it your understanding that that item includes wages paid for people soliciting sales to chains?

A. I don't believe we made any differential between where the solicitors worked.

Q. Put it another way: Isn't all milk purchased by chain stores purchased at its headquarters?

A. Now, you are speaking of purchasing rather than selling?

Q. Yes. I am talking about, or if you want to put it your way, isn't all milk sold by the Bowman Dairy Company sold at the headquarters of the various chains and not to the individual stores?

A. Well, again, my understanding would be more in the direction that you had to sell it both places.

Q. Of course, that is very true. But do solicitors for which the item of wages appears in Schedule 6, does that include sales to chains or just to independents?

A. I would like to have a chance to check that point. My understanding, my understanding is that it might happen. That is what I am trying to answer carefully for you. It [fol. 52] might happen in either case but I would like to check that point on a clarification of my understanding.

Q. Have you made any study as to how Bowman Dairy Company sells A&P, Kroger——

A. If by selling you mean solicits and gets their business?

Q. That is right.

A. I have not observed any actual sale transactions, which is my way of studying it because—I have not observed any specific sales transaction nor I am safe in saying, I

think, none of my men have consciously observed any sales transaction between Bowman and the chains.

Q. Do you know who, or have you inquired or asked of Bowman who in the Bowman organization sells Kroger and A&P?

A. No, I have not because——

Q. No.

A. I have not asked who specifically sells A&P.

Q. Then as far as solicitors' wages appearing in Schedule 6, you don't know whether that item refers only to wages paid to solicitors who solicit independent chains—independent stores, rather than chains?

[fol. 53] A. I do not know whether it is exclusively for one or the other.

Q. You have made no determination as to who sells A&P and Kroger?

A. By the definition "selling" I gave you a moment ago, do you consider serving, a driver says, "Don't you want more because you need more? How about some of this today?"

Q. I am not talking about the driver delivering milk to the store. I am talking about the contract or the agreement made between Bowman.

A. To my knowledge——

Q. And to A&P buying milk and selling it in their stores.

A. Yes.

Q. That agreement.

Mr. Hart: What you are talking is who makes the contract to sell milk?

Mr. Jinkinson: That is right.

By the Witness:

A. I have not seen one of these made or broken it down into elements.

By Mr. Jinkinson:

Q. You don't know who makes the sale?

[fol. 54] A. No, sir.

Q. Do you know whether or not that sale is made by an officer of the Bowman company, such as Mr. Kullman?

A. I still don't know. I don't know who makes it.

Q. Did you make any effort to determine that in this cost study, Bergfeld Exhibit 1?

A. On Bergfeld Exhibit 1 you are asking if I made any effort to determine whether or not any officer of Bowman——

Q. Yes.

A. —consummated the transaction?

Q. That is right.

A. With chains or independents for that matter?

Q. Yes.

A. No, for this reason: That wherever possible in all of these studies, we steered to the more concrete and the more conservative measurements of the cost. The measurements of the officers' salaries and the application of officers' time to any given specialized task has always been a controversial and somewhat difficult thing to bring into precise cost calculations. This whole area of central office and administrative expense we have left out of the so-called distribution cost because to include it would be to indulge in a lot [fol. 55] of somewhat abstract and controversial allocations of their efforts and their abilities and their talents and their time.

Q. Now, you could ascertain very readily the salary paid to any officer. When I speak of officer I mean the president, the vice-president, secretary, on yearly salary, do you not?

A. I think those salaries could be ascertainable. To answer your question specifically, how much of their salary is on a post-facto entity, or the profit basis, how much could be precisely applied to an activity——

Q. Couldn't it, Mr. Bergfeld, have been possible for you to have asked whoever was negotiating with A&P or Kroger to keep a chart or a record of the time spent in negotiation?

A. I take that——

Q. The percentage of time spent in negotiating with A&P and in discussing it with A&P and then ascertain how much of these yearly salaries or of the yearly wage he received in devoting some to the A&P business?

A. I could have done that. I think I have to point out it would have been compelling to take the other accompanying [fol. 56] steps and then account for all of the rest of the time so that we were sure if we included any of his time that we made the proper inclusion of the rest of his time.

Q. Did you ever ask Bowman Dairy Company whether Francis Kullman was ever found soliciting independent stores?

A. No, sir, I did not ask the Bowman Dairy Company.

Q. But he was soliciting the A&P stores?

A. That I don't know.

Q. Assuming——

Mr. Hart: We will stipulate it is the only one in his own neighborhood.

By the Witness:

A. You see, allocating any of that central office, executive central administrative accounting and all that, to have allocated it soundly I would have allocated it all, not just a slice. I would have no way of balancing it up.

By Mr. Jinkinson:

Q. There would have been no necessity of allocating his time to an independent store if he made no solicitation of the store. You only have to figure what it costs Bowman to sell A&P, to find out how much of his time was devoted [fol. 57] to the sale of milk to A&P, isn't that right?

A. No, I don't think it is quite right.

Q. You don't think that is true?

A. I think—may I finish the answer on that other one?

Q. Yes.

A. I think I would have to have allocated some of his time to the direction and the administration of those who did solicit. Of course, then you would have to allocate that part of his time to the direction and to the driver who went to the chain stores as well as the independent store.

Q. That is what I am getting at.

A. To make any allocations I would have to make it on a total basis.

Q. Assume that this record discloses, as I think it does, the fact that no solicitor of the Bowman Dairy Company ever solicited an A&P store or a chain store and all that solicitation was done by headquarters of the A&P.

A. Yes.

Q. The headquarters of Bowman.

A. Yes.

[fol. 58] Q. Then do you think it is correct to have an item that appeared in Schedule 6 reflecting $6,000 or $3,000 spent for solicitors' wages, no percentage of the time devoted by Francis Kullman to be included in the exhibit 6, or Schedule 6?

Mr. Hart: May I make one observation there? We are treating the items "solicitors' wages" just as though the only thing that solicitor did was to solicit business. Now, a solicitor actually goes out when any store complained as to service or anything of that sort as well as asking the man for business.

Now, with that in mind I think your question is slanted at the fact that a solicitor's wages means merely going out asking the man to purchase, which is not true.

Mr. Jinkinson: Mr. Hart, do you disagree with the statement that this record shows that there was no solicitor ever approached any A&P store for the purpose of soliciting business? All the business was arranged between them.

Mr. Hart: I think that is true if you use soliciting busi-
[fol. 59] ness in that particular sense. On the other hand I wouldn't agree that he does not go to the A&P store to answer store complaints.

The Witness: That is what I said, occasionally he may carry a piece of product, something like that.

Mr. Hart: He may be holding business and not obtaining it with the A&P.

Mr. Jinkinson: I may agree to that.

By Mr. Jinkinson:

Q. The fact remains in Bergfeld Exhibit 1 there is no mention made of the amount of money it cost Bowman to sell A&P?

A. I think that is right. It is selling in the sense of the word—I mean in the meaning of the word "sell."

Q. That is right. Now, did you ascertain from an executive of Bowman whether there were any gifts or any entertainments or any other moneys paid to A&P for their business other than the discount given?

A. No. I asked them for these records that are submitted

here and I did not ask about gifts or entertainment of anyone.

[fol. 60] Q. Now, do you know how much time, you asked for how much time Mr. Kullman or any other executive spent at A&P, or that Bowman spent in securing the A&P business or Kroger business or any other chain store business?

A. I did not allocate to these costs for the purposes I mentioned before any officer's time to any specific function.

Q. Now, Mr. Bergfeld, did you make a study of the various methods of sale and collection between chain stores and independents?

A. As those were observed in the time studies before mentioned in specific elements?

Q. Yes.

A. Performed, I did not study them or observe them but as mentioned before their people did study and observe them under our instructions.

Q. They constituted a part of the Bergfeld Exhibit 1?

A. Yes, I think we show a breakdown of collection time.

Q. We will return to these specific parts of this letter.

As I understand it all the independents paid cash, is [fol. 61] that right?

A. Well, I would say that the standard practice, that is the safest to assume for independents is a cash payment. That is the concept of standard. That is the most frequent practice, as we understand it. I am trying to answer you. There might be a scattered exception.

Q. I understand that A&P pays from their central office.

A. That is what I understand, too.

Q. The independent pays cash each day upon delivery?

A. That is my understanding on this standard practice.

Q. A&P pays at the conclusion of the month or by the 10th of the next month, is that right?

A. The actual date when their payment is expected, I don't know, but I can check that.

Q. Did you ask, in making these studies, you ascertained at that time of making these studies when the A&P made payment for the merchandise delivered?

A. I don't think we went any farther than to ask whether they were because it had been standard practice in these other studies I have already mentioned whether they paid

[fol. 62] by check, periodically, or whether they paid daily by cash.

Q. Did you ascertain whether or not the A&P was granted any discount for payment within ten days after billing?

A. Did I ascertain whether or not A&P was given any additional discount?

Q. That is right, trade discount.

A. What?

Q. Trade discount.

A. No.

Q. You don't know?

A. No.

Q. When a driver collects cash at an independent store?

A. Yes.

Q. He returns to his headquarters, and that money is paid that day to the cashier or someone in the Bowman company, is that right?

A. Not quite. When you say that money is paid that day I think in effect the driver's book is kept showing what cash he is accountable for for deliveries made.

Q. When does he pay the Bowman Dairy Company the [fol. 63] money collected, how soon after he collects it?

A. The thing I am trying to accommodate in my answer is the fact that balances are kept against the drivers and from time to time, Tuesday's money collected may not be actually handed in on Tuesday. He may reconcile his book at a later date but for the specific moneys—my point is there is no physically placing of a specific customer's cash in a specific envelope but rather it is kept as a balance figure against the cost.

Q. They some day must pay the Bowman Dairy Company?

A. Yes. Occasionally, when they don't pay, I believe Bowman has a bonding program for that very reason. The drivers are bonded so that if they are short over a period of time and then leave the company——

Q. That does not answer my question. The question is this:

A. You want the expense of that?

Q. Do you know how soon after a driver collects moneys for deliveries to a Bowman store that he pays it to Bowman?

A. Well, I would think fairly soon.

Q. Do you know how soon? Is it that day, the next day, [fol. 64] or at the end of the week, once a month, or when?

A. That requires a st .istical analysis of their pay practices and their money turn-in procedures because——

Q. Did you make any determination of that?

A. As to how many days they are outstanding?

Q. And when he pays the money to Bowman?

A. No, but I can do that. I think we can, if you wait I think we could make up, you see, a frequency study of the——

Q. My question is, you made no determination of that in compiling Bergfeld Exhibit 1?

A. That is right.

Q. You don't know whether Bowman, how soon after Bowman received the money which the driver collected?

A. That is right.

Q. Now, is it possible he received it that day, the next day, or the next day, you don't know?

A. I don't know.

Q. But in any event Bowman had use of the money which these drivers turned in for use in their business?

A. I would assume that moneys turned in to them by the driver was available for further use. I don't know of any [fol. 65] restrictions to their using it.

Q. Yes.

A. There may be, but I don't know of any restrictions to their using money turned in by their drivers.

Q. And the A&P, a chain store account, they paid once a month. Bowman did not have access to that money until it was paid at the end of the following month?

A. Again, I don't know the extent to which Bowman might have ever factored the accounts receivable.

Q. There was no study made by you as to whether or not there would be any saving made to Bowman because of the fact that they received money from independents in the form of cash before they received money from chain stores, saving in the fact they had more working capital with which to work, not necessarily to borrow money, because they carry large chain accounts, or anything like that? Those studies were so made, is that right?

A. That is right. No study was made of the extent to which funds owing Bowman by anyone may have been used

as a basis for borrowing working capital or no study was made to the extent to which Bowman's working capital was [fol. 66] tied up in accounts receivable.

Q. Now, turning to your Exhibit No. 1 and particularly to page 3.

A. Let us just see, page 3 of Exhibit 1?

Q. Yes. These conclusions you reached there, if I am correct in my analysis of it, is that paragraph one, A to K, inclusive,——

A. Are both on the same page?

Q. Yes, page 3.

A. Oh, I am sorry. I was in the introduction. Yes.

Q. The elements appearing in paragraph one, A to K, inclusive.

A. Yes.

Q. Are peculiar to both chains and independents?

A. Are peculiar to both——

Q. Or applicable?

A. Applicable to both.

Q. Applicable to both?

A. Yes. Well, let us go down.

Q. They are headed "Necessary Work Elements."

A. I beg your pardon?

Q. I say the heading of the paragraph is "Necessary Work Elements."

A. Yes.

[fol. 67] Now, as a matter of standard practice—I am differentiating carefully here between standard costs and actual costs and carefully between standard practice and what might by chance occur. Those work elements, I would say, were common, or commonly required by both.

Q. The items listed in paragraph two are applicable to the optional customer service on this, to any independent stores, I would say, and is not applicable to chain stores?

A. Again, on the basis of standard practice, I answer that they are applicable primarily on standard practice to independent stores rather than chains.

Q. In the final analysis of Bergfeld Exhibit 1, the two items listed in paragraph two on page 3 are the differential between selling chains and independents?

A. They are the main difference.

Q. They are the main difference?

A. On services rendered. They represent the main differences in services rendered.

Q. What other services are used? You say there are other differentials other than the two outlined.

A. It depends on whether you are talking about a cost of [fol. 68] an individual delivery or resultant unit cost of the individual total transaction. You see, if you have differences in volume you will also have differences—it will be a factor creating differences.

Q. That appears later in the chart, in Bergfeld Exhibit 1?

A. Yes. But as a matter of standard practice these are the main differences.

Q. Now, b in paragraph two on page 3 states: "Collect cash and delay to collect cash."

A. Yes, sir.

Q. There is no delay you state in collecting cash at chain stores?

A. The delay that is comparable to chain stores is included up here in having delivery slip checked, and that is done in both cases.

Q. So that is applicable to both, here?

A. It is apt to be, that is right.

Q. Chains and independents?

A. Yes. So the delay to collect cash when you don't collect cash is not a delay to collect cash.

Q. That delay only happens, according to your study, in independent stores and the person who is delayed is the driver?

[fol. 69] A. That is right.

Q. Now, isn't it true in chain stores that the entire Bowman organization is delayed in collecting cash until they pay the next month?

A. Well, that gets back to your earlier question, and that is whether or not in anticipation of moneys received from A&P, working capital on a borrowed basis would be available to them in advance.

Q. And no study was made of that?

A. No study was made of that.

Q. Now, I notice that in this page 3——

A. Here.

Q. —in which it lists all the elements involved in delivery to chains and independents, that you have listed under "b,"

"deliver order to store," and you make a differential in the optional customer service under "a" of "delivery services beyond a sidewalk drop."

Well, do you mean to say that in "a"—what is the distinction between "a" and "d"?

A. Those services that we are referring to in summary form herein under 2.a are services which we understand are standard practice and are available to independent stores. [fol. 70] Q. Are they also available to chains?

A. No. It is my understanding that they are not considered to be a part of the transaction of the chain store.

Q. Now——

A. Did you want me to just mention what they are? You said, "What do those consist of?"

Q. I have your Bergfeld Exhibit 1 and I think it explains that.

A. Yes, I think it does.

Q. Plus setting aside bottles.

A. Yes, helping them on the inside of the store. As I understand it many chains object to that sort of activity of drivers inside the store.

Q. Where did you get that information?

A. From the Bowman Dairy Company and their staff.

Q. What were you told with reference to the practice of the chains of having delivery?

A. You mean these in-store services?

Q. For services described under "a".

A. Under 2.a?

Q. Under 2.a.

A. We were told that as a matter of standard practice the chains preferred not to have the driver doing those [fol. 71] things in the store. That, as I remember it, did create traffic problems within the store. At times when they didn't want that kind of traffic, they wanted customer traffic, and also they felt that they had in their store help provided for those things to be done at their own cost and by their own people.

Q. Were you told the reason why?

A. The reason why?

Q. Yes.

A. The reason why the chains preferred that?

Q. Yes, outside of the—were you told this? I will put the question this way:

Were you told that the chains desired to make their own display of their product in the manner they desired to have them displayed rather than to have the Bowman company make it for them?

A. I don't think we were told just that. They were told primarily they wanted—they did not want the driver to perform those in-store services as a standard practice.

Q. Into the next work element——

A. Yes, sir.

Q. —delivery to the store means just taking it inside the store, is that right?

[fol. 72] A. That is right.

Q. Is that the same thing as you refer to on page 8 as the limited service for delivery?

A. That is right. Yes, I think it is. Let me go to page 8. Which paragraph, page 8?

Q. The last paragraph.

A. That is the one you are referring to. That is right, "for delivery."

Q. Did you ascertain whether or not the independents who wanted just the floor delivery and nothing else?

A. Did we ascertain that?

Q. Yes.

A. You see, we didn't talk to Bowman customers at all. We asked the Bowman Dairy staff and employees what the service arrangements were and asked them to arrive at a considered standard practice which would be the thing expected to be done most of the time in most of the cases.

Again I get way back to the technology we talked about earlier. This is a standard costing technique where you base your cost on what is considered to be standard practice. So we didn't talk to any customers of Bowman about anything with reference to it.

[fol. 73] Q. Did you ever ask any official at Bowman Dairy Company whether or not independents had been notified that if they did not want the services provided in 2.a as listed on page 3, Bergfeld Exhibit 1, that they could get a discount comparable to chains if they took a comparable volume?

A. We did not ask that question.

Q. Do you know, have you ever seen any bulletins or any communications to independents that if they did not desire the service as listed in paragraph 2.a, page 3, of Bergfeld Exhibit 1, that they would be submitted the same discount as chains provided they took a comparable volume?

A. We did not ask for such bulletins. We did not ask to see them.

Q. You do not know whether or not independent customers had been advised that if they would dispense with that type of service they could get the same discount if they bought a comparable volume of milk per store?

A. We did not ask that.

Q. Now, Mr. Bergfeld, turning to page——

A. 9.

Q. —Bergfeld Exhibit 1, you state that standards for this [fol. 74] study—I assume for this study—were derived by conducting time studies for deliveries in Elston, Forest, Englewood and south divisions with the bulk of the study in Elston.

A. Yes.

Q. Now, the later charts which appear in Bergfeld Exhibit 1, for example Schedule 2, page 1,—Schedule 2, page 2,—are they based on studies made in the Elston Division only or are they based upon studies made in Englewood, Forest and south divisions?

A. Well, I think that, as we said back here, most of the studies were taken in Elston. Therefore, you could expect that most of these statistical data used most of it, in arriving at these times, would have more Elston content than the other locations you have mentioned.

Q. I am going to have to insist upon an answer, Mr. Bergfeld, a direct answer.

Were these studies which were made in Elston the only studies used in the chart Schedule 2, page 1, and Schedule 2, page 2, or were others used or were studies made in other divisions used?

A. Well, to give you a direct answer to that question, I will have to go back and reproduce that.

[fol. 75] Q. Referring to Appendix "A", page 1 of Bergfeld Exhibit No. 1?

A. Yes, sir.

Q. Now, were all these statistics that you arrived at and which appear on Appendix "A", page 1, Bergfeld Exhibit 1, the result of studies made in the Elston Division only or did they include other divisions?

A. Again I will have to go back and look at the actual dates. I am sorry I can't answer that yes or no as you have asked me to. I will have to go back and look at the date and see the extent to which data from those other locations had been used.

You understand how we do that?

Q. I understand.

A. We take these measurements for these elements and we see if they provide a reoccurring number on the scale of numbers for that defined element. Now, in making up the posting up sheets, I honestly don't remember whether the data from the other locations was used or not.

Q. Mr. Bergfeld, I understand that previous to this examination, Mr. Wooley had asked the Bowman Dairy Company to produce the work sheets upon which the defendant figures appear on Bergfeld Exhibit 1 were used. They have sub- [fol. 76] mitted only time studies made in the Elston Division.

A. I don't remember whether Mr. Wooley asked Mr. Havemeyer for all of the time studies or some of the time studies. I think Mr. Wooley was shown all the time studies, wasn't he?

Mr. Havemeyer: I think he was.

By Mr. Jinkinson:

Q. Would you, tomorrow morning when we resume, in the meantime, can you ascertain whether or not the result of the studies which is entitled "Standard Time Allowances Developed from 1949 Time Studies," appearing on page, Appendix "A", page 1, Bergfeld Exhibit 1, are the results of studies made in the Elston Division and if not, what other studies were included and from other divisions?

A. I shall certainly try.

Q. And also——

A. I don't know whether we can complete that by tomorrow morning or not. I do not know how far back we will

have to trace the data to see how many sources were involved but we can certainly try.

Q. And also if Schedule 2, page 1, and Schedule 2, page 2, of the Bergfeld Exhibit No. 1 were the result of studies made [fol. 77] in the Elston Division only or if studies made in other divisions were included?

A. Yes.

Q. Will you ascertain that by tomorrow morning?

A. We shall try. How far back we shall have to go into the dates I don't know.

Q. Do you recall how extensive your studies were in all divisions of the Bowman Dairy Company in securing data for Bergfeld Exhibit 1?

A. There are several ways of measuring extent and I don't have a cataloging here of how many store stops were observed and how many miles were driven but again we will——

Q. Do you know how many routes in each division?

A. Well, I think we mentioned that here, going back to the page you referred to.

Mr. Hart: Page 9.

The Witness: Page 9.

By Mr. Jinkinson:

Q. Page 9.

A. We say 55 studies were taken of 32 Elston routes from which standard time allowances were developed. To give you an answer how extensive 55 are, assuming that you would like to have us say how many stores and how many [fol. 78] readings——

Q. No, what I am trying——

A. Beyond this, what did you want?

Q. What I am trying to find is this: If you took 55 time studies on 32 Elston store routes in the Elston Division how many time studies did you take——

A. In the other divisions?

Q. On routes in the other divisions.

A. Let me try and ascertain that. This goes back some time and I am not quite sure that even our own log will show how many stores, how many routes and so forth were taken. I am assuming that the number and extent was a little hard

to determine. That is why we made this statement as we did, because it does go back some time. I think those files are pretty voluminous and I believe if that accounting had been simple we would have done it there because the point is in this whole manual, you understand, that we are indicating technique and therefore we, in laying out this technique, hadn't made all these counts too, you know.

Q. I understand.

A. Yes, you understand.

Q. You not only developed the technique here but you [fol. 79] want us to draw some conclusion from the studies finally made as the result of that technique, isn't that right?

A. That is right.

Q. Isn't that true?

A. Let us try and do that. I am sorry not to be able to say what time or how much will be involved in doing it but I think that if we can't give you the specific extent and numbers by divisions tomorrow morning we can at least tell you what is involved in getting them. Then I will have to ask the client the extent to which they want to go into that. That is the instruction I would have to have.

Q. The only thing I am trying to determine, Mr. Bergfeld, is what studies were made and in what divisions.

A. Yes.

Q. And the basis for and the final conclusion reached?

A. Yes.

Q. For example, getting down here to the customers' service page, Appendix "A", page 1,——

A. Appendix "A", page 1?

Q. Yes. This is an example.

[fol. 80] A. I understand.

Q. You finally draw a conclusion. You have .033 (average) per unit.

A. That is right.

Q. Which is very important for us to determine, whether or not that is the result of a technique made in the Elston Division only or all divisions.

A. We will be very glad to try to do that.

Q. I am trying to just find the basis for this.

A. Yes.

Q. The basis for the conclusion you reached. That is all.

A. Yes.

Q. Now, directing your attention to page 7.
A. Yes.
Q. Of the Bergfeld Exhibit 1.
A. Yes.
Q. We have the statement:

"Experience has shown that the independently-owned stores generally want the optional services."

What is the basis for the statement?

A. That again is based on our way of inquiring into what are the standard practices.

[fol. 81] Q. And that inquiry——

A. Was directed for the purpose of deciding how to differentiate——

Q. And directed to whom?

A. Employees of the Bowman Dairy Company. Again we didn't talk to their customers.

Q. You made no study. In other words you accepted the word of someone from the Bowman Dairy Company that the independently-owned stores generally wanted that type of optional service?

A. That is right.

Q. And do you mean to state then that this report is based upon the statements of people from the Bowman Dairy Company and not upon an actual survey by you?

A. Well, I mean to say that that point of establishing what the standard practices were is as I have said based on the statement of the people in the Bowman Dairy Company.

Q. And not the result of independent research by you?

A. We did not, to repeat, make the time studies nor did we interview customers as to their services.

Q. Let me ask you this question:

Who in the Bowman Dairy Company told you that inde-

[fol. 82] pendently-owned stores generally wanted the optional services?

A. I believe several there did. Just who they were on different occasions I don't know but there was a general agreement among the management that this was an assumption for purposes of studying a standard practice and method of serving the store.

Q. Now, the optional services, I believe you testified, is the big differential between cost of servicing chain stores and independents?

A. By our finding optional services are a big factor in the difference between serving the independent stores and chain stores.

Q. You say it is a big factor. Referring to Schedule 2, page 2.

A. Yes, sir.

Q. Of customer service——

A. Where are we now?

Q. Page 1, I mean.

A. Page 1?

Q. Yes. The customer service, which, of course, is the optional service——

Q. —the collections and the delay to collect are the only [fol. 83] three items which are different from the services rendered the chain stores and constitute in the end the differential as the basis for granting discounts. That is right, isn't it?

A. From the standpoint—again I have to go back to the same answer I gave to what seemed to me like a similar question: As far as the cost of an individual stop these other factors that I mentioned, of volume and so forth, must be included in as factors contributing to differences in the costs.

Q. Yes.

A. I answer it with that addition.

Q. Now, Mr. Bergfeld,——

A. Yes.

Q. I hand you Defendant's Exhibit 7, marked 7——

Mr. Hart: Bergfeld Exhibits.

By Mr. Jinkinson:

Q. Bergfeld Exhibit I guess you better put it, Bergfeld Exhibit.

A. Bergfeld.

Q. Bergfeld.

A. Yes.

Q. Bergfeld Exhibit 7.

A. This is another designation from this.

[fol. 84] Q. Yes.

A. All right.

Q. Bergfeld Exhibit 7, which contains pages 1 to 56.

A. Yes.

Q. These were submitted by the Bowman Dairy Company.

A. I mean you are calling it Bergfeld Exhibit No. 7?

Q. Just to differentiate them from Defendant's Exhibits 1, 2 and 3.

A. Not because their origin is of myself or my staff?

Q. No. Their origin from your staff. These were submitted by Mr. Havemeyer, with a letter?

A. Yes.

Q. In which he states:

> "Enclosed are individual route tabulations of the number of units delivered to independent stores which had no customer service during the 1949 time studies."

A. Yes.

Q. We have checked that.

A. All right.

Q. Added them. We have discovered that they amount to 295 stores, exclusive of chains. Those are independents?

[fol. 85] A. Yes.

Q. Which did not take customer service?

A. Yes.

Q. Now, I show you another exhibit which is marked Bergfeld Exhibit No. 8 and which includes pages numbered from 1 to 62.

A. May I again ask the origin of this?

Q. Well, the same origin.

A. The same origin. I remember talking with him.

Q. Exhibit No. 8 reflects the number of stores which took customer service and the total of both those independents, as reflected in Exhibits 7 and 8, which took customer service, those that did not take customer service, totaled, according to us, 739 stores.

A. Yes.

Q. I would like to have either you or Mr. Havemeyer verify our computation to that.

A. We will be glad to do that, meaning not now but sometime soon.

Q. You can do it either now, or later. What time is it?

Mr. Hart: Twenty after. We can take a recess for a while. [fol. 86] Mr. Jinkinson: We will take a recess to see if our computation is all right.

The Witness: Let me be sure that we make the computation verification you want.

By Mr. Jinkinson:

Q. Yes.

A. You want us to add up the number of stores?

Q. Exhibit 7, the number of stores appearing in Exhibit 8. That is all.

A. The first thing I will have to determine is if they are additive. I mean I don't know whether we are adding. Let us try and verify your computation.

(Recess taken.)

By Mr. Jinkinson:

Q. Now, Mr. Bergfeld, I show you, or look at your Bergfeld Exhibit 1, Appendix "A", page 1.

A. Yes, sir, I have it.

Q. The heading is "Standard Time Allowances Developed from 1949 Time Studies."

A. Yes, sir.

Q. Now, referring to Bergfeld Exhibit 7, page 1, which I have in my hand here,——

A. Yes.

[fol. 87] Q. The letter addressed to Mr. E. Wooley, United States Department of Justice, Anti-Trust Division, 219 South Clark Street, Chicago, Illinois:

"Dear Mr. Wooley:

"Enclosed are individual route tabulations of the number of units delivered to independent stores which had no customer service during the 1949 time studies."

Now, is it your understanding that the reference to 1949 time studies in Exhibit 7, page 1, is the same as the Appendix "A", page 1, of Bergfeld Exhibit 1?

A. You mean the '49 time studies referred to are the same?

Q. Yes.

A. That is my understanding.

Q. All right. Now, the letter states these independent stores which are attached to Bergfeld Exhibit 7 are the stores which got no customer service during that time study which is reflected in Appendix "A", page 1, Bergfeld Exhibit 1, is that true? Do you know?

A. I don't know but I am not entirely clear on your ques-
[fol. 88] tion. You understand the problem, the basic question that I am concerned about is whether or not the numbers you have added are additive, as I said before, or whether the cause of the different days in which the stores were studied, a store is being considered in more than one way.

Q. I don't know what you mean. I know that I have confused you sufficiently this afternoon. You will pardon me when I say "you." You confused me once by your saying "additive." What do you mean by "additive"?

A. That they can be added. You see, you put down a series of numbers, the sum of which does not carry meaning. You could put down the old question of adding horses and apples and if you added them together you wouldn't have a meaningful sum.

Q. You would only have 27 horses and apples, is that right?

Mr. Hart: No horses and apples.

Mr. Jinkinson: No apples, horses.

By the Witness:

A. I do not mean to be facetious. I think it will take, if you don't mind, a pretty detailed cross checking rather than just checking on the addition. I think we could do
[fol. 89] that fairly soon. But I think it will take a detail of cross checking to be sure that the figures are additive. I think Mr. Wooley will agree.

By Mr. Jinkinson:

Q. Mr. Havemeyer forwards to us a letter in which he attaches a list of stores, independent stores, which had no customer service during the 1949 time study; do you think he meant anything different than that which he wrote in his letter?

I call to your attention—first answer the question so we will have it in the record.

A. There may have been a better wording for his letter.

Mr. Hart: I submit that the only way you can get an intelligent answer is to go back to the time studies that are listed in the attached list to determine whether or not that particular time study shows, that covers both days for a stop, it covers only one day for a stop, or what it does.

By the Witness:

A. That is what I would like to do, to feel qualified to answer the question I have been asked. I would like to go [fol. 90] back and check that to be sure.

By Mr. Jinkinson:

Q. Mr. Bergfeld, I direct your attention to the attachments of Bergfeld Exhibit 7, 1 to 56.

A. Yes, sir.

Q. I direct——

A. Pages 1 to 56?

Q. Yes. I direct your attention to the heading of each one: "Summary of Units Delivered Independents with No Customer Service."

A. Yes.

Q. And it has the route number on it.

A. Yes.

Q. It has a study number?

A. Yes, sir. You understand the reason it has the study number?

Q. No, I don't. I am going to ask you that.

A. That is because there was more than one study taken.

Q. Right. And the next study is Study No. 611?

A. That is right.

Q. Bergfeld Exhibit 7-3 says "Study No. 612, Route No. 52," right?

A. That is right.

[fol. 91] Q. Well, weren't all the studies you made during the 1949 time study given a study number?

A. To my memory, I believe they were, each one was given a number.

Q. Isn't this exhibit, page No. 7-1, I mean Bergfeld Exhibit 1, or 7, pages 1 to 56, all taken from those studies made at that time?

A. To my knowledge they are.

Q. Where are they inaccurate?

A. Inaccuracy does not come—my concern about inaccuracy is not what is shown here on these individual pages.

Q. Right.

A. But what has been done to these numbers in your earlier statement where if they were added in such a way as to have the same store to be counted once as receiving and again as not receiving, the resulting sum is not an accurate reflection of the meaning I think you are looking for.

Q. Can we agree, according to Bergfeld Exhibit 7, pages 1 to 56, inclusive, that there were at least 295 occasions when an independent store did not receive customer service? You say it is one day, two days, or what?

[fol. 92] Mr. Hart: Yes, I think we can agree to that.

The Witness: Occasions?

Mr. Jinkinson: Yes.

Mr. Hart: Presuming the additions are right, we will trust Mr. Wooley that far.

Mr. Wooley: Thank you.

The Witness: Well, Mr. Hart has answered the question.

By Mr. Jinkinson:

Q. I want you to answer it.

A. Like the other answers to the questions you asked, it is a calculation I haven't made.

Q. Assuming your calculation to be correct?

A. Well, if I assume that I have in effect answered your question. It is that assumption that—I hope I am not being difficult. It is that assumption I am reluctant to make.

Q. You are not being difficult, you are just evasive.

A. No, I don't think so. You have asked me to assume a given figure was right; and, therefore, if I assumed it was right, would I agree to it.

Well, on the basis of that assumption there is no alternative, it seems to me, as I mentioned earlier, I would like to [fol. 93] check it, but I am perfectly—that would be my preference.

Q. What was your answer, that yes there were occasions, at least some occasions, when a customer, independent store, did not give customer service during the 1949 time study?

A. I am answering now the question: Do I think there were occasions when some independents did not get customer service?

Q. During 1949 time studies.

A. Yes, I think there were some occasions. How many is what I don't know, but I think there were some occasions.

Q. Mr. Bergfeld, will you point out in Bergfeld Exhibit No. 1 where there is any allowance made in your form of computation for those independents which did not receive customer service which is the basis of your differential between discounts to chains and independents?

A. I do not believe in Exhibit No. 1, if I understand your question correctly, that there is any adjustment for the fact that some independents sometimes do not take customer service.

A. Mr. Bergfeld, I hate to ask you to do all of this work, [fol. 94] but between now and tomorrow morning, can you determine how many occasions during the 1949 time study, independents did not take customer service?

A. I can certainly try.

Q. Now, Mr. Bergfeld, have you personally or any member of your organization, in making these studies, ever examined any of the route books of the Bowman Dairy Company?

A. On many occasions for many different reasons, not I as much as my staff. I have not seen many of them myself but my staff have reviewed the route books.

Q. Are you familiar with the contents of those route books?

A. Yes, generally, yes. I know what is contained, I know what is intended to be contained in the route books, what their purpose is. I have no memory of any specific entry in any specific route book.

Q. Mr. Bergfeld, I hand you a route book marked Bergfeld Exhibit No. 9, which purports to be the route No. 129 for March of 1955.

A. Yes.

Q. And I show you page 11.

A. Yes, sir.

[fol. 95] Q. Now, there is a notation reading: "No milk put away."

A. Yes.

Q. Is that right?

A. That is right.

Q. What is meant by that notation?

A. Well, the only meaning I could put on that notation is a literal one.

Q. What would that literal meaning be?

A. No milk put away.

Q. Would it be customer service? Is that the customer service referred to in Bergfeld Exhibit No. 1?

A. That is part of the customer service.

Q. That no milk—well, the other part is the delay in collection?

A. No. The other part is taking it to the back of the store, putting it in a place of his choice.

Q. Rearranging the bottles, taking the old milk out in front and putting the new milk behind?

A. Yes. Whether or not that statement means all of those things, I don't know.

Q. I show you an exhibit. I show you page 8 of the Bergfeld Exhibit No. 9.

[fol. 96] A. Yes.

Q. What is the customer's name appearing thereon?

A. As I read it, it is Charley's Market, market abbreviated as "Mkt."

Q. The address?

A. 427 West 69th Street.

Q. What notation appears on page 8 of Bergfeld Exhibit 9?

A. There are two notations on page 8 of Exhibit 9. I assume it is 9.

Q. That is right.

A. One is, "Give order," and the other is "No milk put away."

Q. That is the same as appears other places in Exhibit 9 in which appears Stenn's Market?

A. Stein's.

Q. Stein's Market?

A. No, sir, I think the opposite occurs.

Q. Milk put away. Milk put away there?

A. It is mentioned in Stein's Market.

Q. Milk put away.

A. It says they do put it away.

Q. They put it away there?

A. Yes.

[fol. 97] Q. I will show you page 9 of Bergfeld Exhibit 9.

A. Yes.

Q. The store listed there is Kroger's.

A. Kroger's. Kroger's as it appears here is 7260 West Ave.

Q. West Went.?

A. W-e-n-t.

Q. And the notation there is on page 9?

A. Two notations are on page 9, "Give order" and "No milk put away" and the third notation is "Use side door."

I think there were additional notations besides those, on other pages we referred to. May we go back?

Q. Page 8.

A. Charley's Market. It says, "Use side door and two trips." That means that we have to take a second trip back to that store.

And then shall we look for the additional notes that there might have been on the other page?

Q. What other page was it?

A. There is quite a few "Milk put away" as we go through.

Q. What?

[fol. 98] A. Quite a high incident on it. It says "Milk put away Monday only."

Q. Monday only?

A. I don't know whether that means that he only put it away on Monday.

Q. You don't know whether it means it is only serviced on Monday?

A. I don't know which meaning it has.

Q. You do know all of it appears on Monday only?

A. Yes, "Milk put away Monday only."

Mr. Hart: He can tell whether he gets milk on other days than Monday based on the charges of the book.

The Witness: I am speaking from the note.

By Mr. Jinkinson:

Q. On page 6 of Bergfeld Exhibit 9 appears, what store and what address?

A. It says, "A&P." This is really on page—yes, call it page 6, open page 6, "A&P, 6702." Again I believe it is Went. Ave.

Q. What notation has reference to what to do with the milk?

A. "No milk put away."

Q. "No milk put away"?

[fol. 99] A. The other quotation there is "Gives order." If there is anything else that is significant—let us look at some more. Excuse me.

You want to ask?

Q. Yes. On page 8 of your Bergfeld manual.

A. Yes.

Q. No. 1.

A. Yes.

Q. Bergfeld Exhibit No. 1.

A. Yes. Exhibit, page 8, Exhibit 1, right.

Q. Has a notation that, page 8, appears some of the optional services.

A. You see that is why I wanted to take a look at that additional note. Down here we say, among the optional services is this calling back later in the day. There is a case of Charley's Market—wasn't it Charley's Market?

Q. Right.

A. Where he didn't have the milk put away——

Q. He did have the milk—he did not have the milk put away?

A. He did not have the milk put away, as I remember it, and it did say two trips. And that is what we mean in this service on page 8, "Call back later in the day."

[fol. 100] Can I show you what I mean? That is another case, Charley's Market.

Q. This is Wilson.

A. Calling back later in the day, as we found in that notation of no put-away.

Q. Yes.

A. Is another additional service.

Q. Do you know what that service was?

A. Calling back later in the day?

Q. Yes.

A. Where it says two trips?

Q. Yes.

A. No.

Q. Do you know whether that was to deliver more milk?

A. I would assume that it was for some purpose. Now, whether it was for the delivery of more milk or not, I don't know.

Q. What other reason would they go back for if it wasn't for the delivery of more milk?

A. He may not have been able to get the slip signed. It may be he may not have gotten the order. If it was a regular thing for two trips a day I would assume there was some regular reason for his going back. Just what it was [fol. 101] I don't think any of us can devise from the note.

Q. I will show you page 13, open page 13 of Bergfeld's Exhibit 9 and ask you to read the notation there.

A. It says, "After serving Wilson return to Charley's Market," page 8, I believe.

Q. Yes.

A. Second trip.

Q. Yes.

A. Then it says "Collect and pick up." I don't know what that means.

Q. Cases, isn't it?

A. Yes, it might be cases. It might be cases.

Q. Well, and the occasion for the second trip is to collect and pick up the cases, isn't it? It isn't to deliver additional milk?

A. I am not at all sure that is true.

Q. Is it three trips that the driver makes to Charley's Market?

A. No. I am simply leaving room for the possibility where it says "Return to Charley's Market," that page 8, second trip, that it may be for these reasons and others.

[fol. 102] Q. It only says on page 8, of course, is Charley's Market.

A. That is right. It says two trips.

Q. It says two trips.

A. And on those two trips it doesn't say.

Q. What they are for?

A. To collect.

Q. It doesn't. Over here on Wilson's Market, page 13, Bergfeld Exhibit 9, it does say, after serving Wilson, "Return to Charley's Market," page 8, second trip.

A. Yes.

Q. "Collect and pick up cases."

A. Well, again I see what you have asked me to read.

Q. That is right. I am not asking you for an interpretation of it. I am asking you if that appears there.

A. Yes. I see what I have read.

Q. That is right.

Mr. Hart: I would certainly agree that you two gentlemen are going to indulge in an interpretation of what you find in a milk route book and you have a fertile field for imagi-
[fols. 103-104] nation.

Mr. Jinkinson: Well, off the record, I have not seen any addresses other than store addresses.

The Witness: Or any other reasons for calling back.

Mr. Jinkinson: Which leads me to believe the old theory about the milk man is much maligned.

Mr. Hart: Maybe that is the reason, Earl, for the union insisting on such premiums for store delivery as against home delivery.

Mr. Jinkinson: Let us quit now and resume tomorrow morning.

Mr. Hart: What time do you want to resume?

Mr. Jinkinson: Is 10:00 all right?

Mr. Hart: Yes.

(And thereupon the further taking of the deposition of the Witness Bergfeld was continued until Friday, September 7, 1957, at 10:00 o'clock a.m.)

[fol. 105] September 7, 1956

ALBERT JOSEPH BERGFELD, having been previously duly sworn, was examined further and testified as follows:

Cross-examination. (Resumed)

By Mr. Jinkinson:

Q. Mr. Bergfeld, you were previously sworn and you are the same Mr. Bergfeld who testified yesterday?

A. I am, sir.

Q. Now, during our intermission, have you had an opportunity to examine your records and determine whether or not records taking other divisions of the Bowman company, other than the Elston Division, were used in computing Appendix "A", page 1 of Bergfeld Exhibit No. 1?

A. We worked on that last night, as we promised you we would, and we did some checking, particularly on this customer service element. We chose that first because we thought it would be to your greatest interest.

And we did verify that the time studies of Elston were the basis provided for the customer service element listed in Appendix "A", page 1.

Now, to verify the other elements—or to determine if the other elements were based strictly on the Elston time [fol. 106] studies, I made a general review of some of the working papers. I have found no trace of these standards having anything but Elston time study readings in them.

Q. All right. So that it is agreed that all the figures—or it is agreed the basis for the figures appearing in Appendix "A", page 1, of the Bergfeld Exhibit 1, were from the Elston Division only?

A. No. I wanted to finish. I said I found no trace of figures anywhere else. And if you want to have absolute assurance of the point, I can go back and check the other elements as we did customer service.

Now, this is a service again to you. We tried to determine how long that would take to check through this one element and verify that all the data used in making it up came from the Elston time studies took about a one and a half to two man weeks. To do it with that same absolute assurance for all the other elements would take about that long.

Q. Well, is it a fair statement then to say your research last night determined, as regards to customer service,

appearing in Appendix "A", page 1 of the Bergfeld Exhibit [fol. 107] 1, all the figures used there were from the Elston Division only, and that as to the rest you do not know at this time? You could not say?

A. Not with the same assurance.

Q. You could not say with the same assurance, that would be a fair statement?

A. Could not say with the same assurance as the rest of the elements, but on that one we give you that.

Q. Now, did you make the same study of customer service in other divisions of the Bowman Dairy Company?

A. When you say "the same study of customer service,"——

Q. Yes, as it appears on page 1, Appendix "A", Bergfeld Exhibit.

A. I do not remember that we have ever done it completely for another division.

Q. You take samples?

A. I think primarily to determine the time standards.

Q. And did they vary? What did your findings show? Did they vary in other divisions, either above or below the point .033 which appears on Appendix "A", page 1?

[fol. 108] A. Well, now, I have got this down to .033 I realize——

Q. Well, wait a minute. First you answer the question.

A. All right.

Q. Did they vary any?

A. Well, we did not calculate the 033, see? For these other divisions where we time studied—this is what I did not realize until late yesterday, I don't think it has been completely understood by you folks before, is not completely explained probably to have given you that.

See, the 033 is a figure of time, divided by units. In other words, the 033 is not a pure time study reading, it is a correction of the time required for that element in terms of time per unit, not per customer.

Q. I understand that, per unit per bottle handled everywhere.

A. To all independents.

Q. To all independents.

[fol. 109] A. It is an average. Whether they took customer service or not, see, that is why I mentioned—that is

why I was recalling yesterday, you were adding up customers. I think you asked me another question yesterday, about whether or not we had corrected for customers on the matter of customer service.

Well, Mr. Jinkinson, it did not seem possible to correct on the basis of customers. And I believe I answered your question yesterday saying that nowhere in this report had we attempted a further correction by customers, because I assumed that you realized that we have had to make a correction on a unit basis instead of on a customer basis.

Now, may I go on? Is this a useful direction for me to answer?

Mr. Hart: I wish you would for me, because I am frankly confused now.

Mr. Jinkinson: I am sufficiently confused.

Mr. Hart: I wish you would show me how on 033, or .033, it is arrived at.

The Witness: Well, let me show you on the pages that were given to Mr. Wooley, we showed, as you remember, [fol. 110] independents——

Mr. Hart: Referring to Bergfeld Exhibit what?

Mr. Jinkinson: 7.

Mr. Hart: Or 8, or what?

Mr. Wooley: 7, in this particular one.

The Witness: Here were a list of those customers that on this study took no customer service. (Indicating.)

Mr. Jinkinson: Right.

The Witness: Now, this is not to imply that they never take customer service, but it simply says, as liberally as we could make it on this study, they did not.

Now, also I think—is this the same exhibit?

Mr. Jinkinson: No, this is Bergfeld Exhibit 8.

The Witness: 8. Now, here you will see that we took again customers who were observed to have had those services. And also there we list the time.

Mr. Jinkinson: That is right.

The Witness: Now, if you were to add up that time——

[fol. 111] By Mr. Jinkinson:

Q. On all time in Exhibit 8?

A. Oh, yes, sir. All time.

Q. On Exhibit 8.

A. It would come to 223275 total minutes.

Now, there is a little three minute possible discrepancy there. Now, if you don't mind me looking over your shoulder——

Q. That is all right.

A. You see, as you understand, these are pencil notations taken out in the weather riding on a truck, and sometimes a 3 looks like a 5, and a 2 looks like a 3; but overall I think we balanced out within three minutes in the 223275.

Now, those minutes were then used for the correction of customer service, not being rendered all the time, because those minutes were divided by the total, not only of these units but these units plus these units (indicating).

So we corrected on the basis of the units rather than the customer for this very good reason, is that it isn't, as I think I mentioned yesterday and these need not be additive, it [fol. 112] isn't possible for us to always say this is the customer who takes the service and this is an independent customer who does not take the service, because the customer can change his mind, and apparently has changed his mind, taking it as we dug out last night as you asked us to, how many cases where these would be double listed. And we have some findings on that which I can show you.

So instead of the cost calculations being for a customer correction, as your question of yesterday indicated, we made it as a unit correction by taking all the units delivered to the independents, divided into the time spent on these services for independents.

Q. For all independents?

A. The time spent for all independents. Of course, where there is no time spent there would be nothing to add into the figures.

Q. That is right, but for all customers?

A. That is right, for all independents.

Q. For all independents, whether they took the customer service or whether they did not take the customer service, is that right?

[fol. 113] A. Right.

Mr. Hart: One thing I would like to clear up for the record before you go on. You said, "We took these units and these units. Now, is it true that, for the purposes of

the record, you were adding the units represented in Bergfeld Exhibit 7 to the units represented in Bergfeld Exhibit 8? Are those the two, "these units," you are speaking of?

The Witness: Yes. Now, again, understand we had to work with material that is not absolutely easy to read. We are working with some manual figures here. And again I think that if you were to add these with your staff——

By Mr. Jinkinson:

Q. These figures appearing on Bergfeld Exhibit 8, if you were to add those figures, you mean the time and the units?

A. Yes, sir.

Q. All right.

A. And you would take also the units from Bergfeld Exhibit 8 and add them to units as shown on what I believe [fol. 114] you designated as Bergfeld Exhibit No. 7, you would come to a figure substantially——

Q. 66,500——

A. Substantially the same as 66,574.

Q. Right. And in that figure, 66,574, appearing in Appendix "A", Bergfeld Exhibit 1, page 1——

A. Yes, sir.

Q. (Continuing)—is included for customers who took it, independents who took the customer service and independents who did not take the customer service?

A. In that figure is included units——

Q. Right.

A. —going to customers who did take customer service and customers who did not take customer service. I keep saying "units."

Q. Units is all right.

A. That is why yesterday my answer to you on customers was a liberal answer. It was not a customer correction, it was a unit correction.

Q. Let me repeat again so I understand it correctly. The figure 66,574 appearing on Appendix "A", page 1 of Bergfeld Exhibit No. 1 represents the addition of all the [fol. 115] units of Bergfeld Exhibit 8 and Bergfeld Exhibit 7, and on Bergfeld Exhibit 7 appears to be customers who did not at one time or another take the customer service?

Mr. Wooley: And Exhibit 7.

The Witness: Exhibit 7; are customers who did not take customer service during the course of the study thereon indicated.

By Mr. Jinkinson:

Q. That is right. All right.

Mr. Hart: Well, now, what is your point in there, that they may have at other times taken customer service?

Mr. Wooley: That is recognized.

The Witness: I can't get at this from the standpoint of a customer.

Mr. Hart: Yes, I see.

The Witness: I have to say units being delivered to independent stores will require from time to time, and have required by observation, customer service time.

Mr. Hart: An average of .033?

The Witness: That is right, as these calculations read. [fol. 116] Mr. Hart: I see.

The Witness: I cannot correct on a customer basis because I am not sure the customers will stand still for me. The relationship of that to your question, Mr. Jinkinson, I have not gone through for the accompanying time studies in these other divisions a similar corrective calculation to this.

And I might also say this, too, that wherever there was any doubt about whether a figure was to be included or not, I think you will find that we consciously, deliberately steered on the side of keeping it higher, the figure, so the 66,574 I think is a good representative interpretation of the data we have used in calculating, copies of which I think you have.

By Mr. Jinkinson:

Q. All right now. As long as we are on the point, on the .033 figure, I will ask you this question: Does it assume that a driver of Bowman Dairy Company carries one case at a time, that figure?

A. Well, this particular figure is a mixture of more than [fol. 117] just carrying time.

Q. Well, I do not mean carry, I mean handle one case.

When he brings it, it also includes the time, does it not, from the time he gets it from the truck and brings it in the store and puts it in the cooler, and rearranges the bottles, or anything else he has to do with it; it represents all that time, does it not?

A. Yes.

Q. Well, does it represent that a driver is handling only one case at a time, or at independent stores where he delivers three or four cases, that he is carrying the three or four cases together?

A. Well, I think you said "assume."

Q. Yes.

A. Now, I do not believe that we have assumed here, I think we took the actual time and the actual units in arriving at this standard. And as we call this times—remember that I spoke of them here—those are direct observations from the time studies, aren't they?

Q. That is right.

A. And these units are direct observations from what was taken in?

[fol. 118] Q. Right.

A. So there is no assumption as to how many cases carried, it was simply observed cases, observed time, one divided by the other. I do not know whether that accomplishes the purpose of your question or not. But I am trying to reply to that——

Mr. Hart: Let me see if I understand that. In other words, you took the actual time. Let's assume a driver took four cases in on a dolly——

The Witness: Yes.

Mr. Hart: (Continuing)—and on your time study you were charging up a certain length of time. Now, you took the actual time that he was in that store making that four dolly delivery, and that is a part of this 2,232 minutes?

The Witness: That is right.

Mr. Long: You mean four cases on one dolly?

Mr. Hart: Four cases on one dolly, yes.

The Witness: Well, that time might have been when he was carrying one case by himself. You see, that is a different kind——

[fol. 119] Mr. Hart: The actual time that he spent in the store. Is that it? Then when you came over to determining

the number of units, this 66,574 that you were going to divide into this 2,232, there you took the number of units that were delivered on all of these studies that you made?

The Witness: That is right, as shown by the sheets.

By Mr. Jinkinson:

Q. All right. Now,—are you through?

Mr. Hart: Yes.

By Mr. Jinkinson:

Q. Well, now, do the trucks of the Bowman Dairy Company carry dollies as part of their equipment.

A. I think there is a variety as of now. I think some have hand trucks, some have dollies, I think some stores provide dollies. The thing is, there is no safe generalization on that point. I think it is a matter of pretty much individual practice.

Q. Well, referring now to Schedule 2, page 1 of Bergfeld Exhibit 1——

A. Yes.

Q. —now then, no, Schedule 2.

[fol. 120] A. All right.

Q. I don't think that is the right one. Schedule 2, page 1.

Mr. Hart: Schedule 2, page 2.

Mr. Jinkinson: No, Schedule 2, page 1.

The Witness: Schedule 2, page 1?

Mr. Wooley: That long table. Way before that. That one (indicating).

By Mr. Jinkinson:

Q. Now, you have the stores classified according to volume.

A. Yes.

Q. Now, a driver delivering a case of milk or a supply of milk to a store taking ten units per day, that is equivalent to not even half a case of milk. In all probability you would not use a dolly, you would just take it in?

A. That is right, in all probability.

Q. Now, when you get down to a store which uses a 200 unit order, which represents eight cases of milk, eight and a fraction, he would in all probability use a dolly?

A. If I were he, I would.

Q. Well, if you were an engineering expert you would [fol. 121] advise him to use a dolly, would you not?

A. I would advise him to use some carrying convenience. When you say "dolly," these hand trucks do come into proper use.

Q. That is right, anything that would carry more than one case of milk?

A. That is right. Anything that would increase his convenience.

Q. Well, now, the question is this, did you ever study the possibility that the average time per unit would be different for different sizes of deliveries?

A. The average time per unit?

Q. Yes.

A. Yes.

Mr. Wooley: Per customer service?

The Witness: Oh, per customer service?

By Mr. Jinkinson:

Q. Yes.

A. Oh, for customer service the time would be different for various sizes of delivery.

Q. That is right. To put it specifically, do you make a comparison in the time per unit for a man carrying one case in by himself at one time versus a man who carried five cases in on a dolly?

[fol. 122] A. For the customer service?

Q. Customer service, yes.

A. I think our method of calculation takes care of that. As you see, we have over here said that the .033—and again I am afraid this is part of the problem you get into when you handle this on a customer basis—the .033 is per unit.

Q. That is right.

A. So in testing how much should be allowed for an independent store stop, we do not just take so much for the customer stop, we take the .033 and multiply it by the number of units.

So that if there are a lot of units, we are assuming there will be a lot of .033's required.

Q. But 033 equals an average per unit, is that right?

A. That is right.

Q. Whether it is handled by a driver taking one case at a time or a driver taking five cases in on a dolly?

A. With or without the aid of anything, that is right.

Q. No, with the aid of a dolly or a carrying case, or whatever he uses.

A. Whatever was used when he was observed.

[fol. 123] Q. That is right. Isn't that true? Is that what 033 represents?

A. 033 represents just what I mentioned before, the amount of time divided by the number of units.

Mr. Hart: Before we go on with this, let me understand something. Now, I am going back to this Appendix "A", page 1. You have an item in here, "delivered order, 7.795 for the first case, and .295 for each additional case."

The Witness: Yes.

Mr. Hart: And then on the other hand you have this customer service thing. As I understand it, Mr. Jinkinson's questions are now phrased, why, we are treating this customer's service as though it included taking the stuff into the store.

The Witness: If that was the intention, I do not think that is correct. I think what Mr. Jinkinson was asking——

Mr. Jinkinson: No, I agree with you. I was specifically directing my questions to determine the amount of time spent under your customer's service as it appeared in Ap-
[fol. 124] pendix "B", page 3.

The Witness: Now, I think I can say that we have reasoned this problem the same way that your question indicates that you are reasoning, and that is, if you have a lot to bring in there is apt to be required more time for putting it away.

And that is again our reason for correcting on this thing on the basis of units. So you would multiply the units, you see, by .033 and have the allowance grow with the volume to be in-store service.

By Mr. Jinkinson:

Q. That is all right, but the point is the proportionate time in handling one unit versus the proportionate time in handling—I mean, not one unit, one case of 24 units, versus five cases of 120 units—well, let me give you an example of what I am trying to get at.

Assuming a driver handles one case, he brings it into the store, it takes him one minute to put it away, that 24 quarts [fol. 125] or 24 units, and he gets 1/24th of a minute per unit. Now, if he brings in five cases we assume the question—the question is, if it takes him two minutes to put it away, there are 120 units involved, of course it would take 1/60th per unit per minute.

Mr. Hart: That is the point I get confused on. I can't see the difference, if you are putting it away, putting it in an ice box, how it is going to change by the fact you are using 60 instead of 12. You are still going to be handling 60 bottles.

Mr. Jinkinson: Yes, but it isn't all just putting away. I direct counsel's attention to the enumerated Paragraph 16 in Appendix "B", page 3, under "A", where a part of the customer's service consisted of moved cases to another part of the store other than the place where the original delivery ended.

Mr. Hart: In other words, your original delivery you are talking about there is after this deliver order, charged so much for the first case and so much for each additional case. [fol. 126] Now you are going to do something after having completed that?

Mr. Jinkinson: That is right. It is all, I understand, constant. It is one of the constant elements. Here it is.

Now, the deliver order where you get the .795 for the first case and .295, that is a constant element which is both constant for chain and independents.

The Witness: No, sir, that is not quite the meaning of "constant."

Mr. Wooley: Same service rendered to both, he means, both chains and independents alike for that particular service.

[fol. 127] The Witness: I just want to be careful we don't mix up the idea of a fixed element.

By Mr. Jinkinson:

Q. No. To continue my question, then you get—the thing of my question, then you get over to this customer service.

A. Yes.

Q. Now, the question is, in moving the cases to another part of the store other than the place where the original delivery ended, did you make any study as to the proportion of time spent in moving one case versus the proportion of time spent in moving five cases on a dolly? I mean, that is the whole problem.

A. To the extent that that movement complies with 16-A.

Mr. Hart: When you say 16-A you are talking of Appendix B, Page 3?

Mr. Jinkinson: That is right.

The Witness: No, we did not make any study of the difference between in store movement per unit of stores having five cases or one case, because our problem was one of tying the customer service back to the unit and not the individual customers.

[fol. 128] Again, I do not think I have made myself clear that if we approach this on a customer basis you cannot handle it. We have not made a customer correction. We have taken it on the basis of units and we have allowed for the risk of what we know is going to be required on some independent stops that these customer services in store will have to be performed.

By Mr. Jinkinson:

Q. However, referring back to Schedule 2, Page 1 of Bergfeld Exhibit 1——

A. Schedule 2, Page 1. Yes.

Q. Your classification of customers, however, does have some effect upon the proportion of time used in moving the different volumes as appearing in the different classifications, do they not?

A. Only because of the difference in units.

Mr. Wooley: That is right.

The Witness: Only because of the difference in units.

Mr. Jinkinson: All right.

The Witness: You will have to give me a chance to say

a little more on this point later. This standard has its own [fol. 129] problems which we have solved in the way I have tried to demonstrate. And also which with this is available.

By Mr. Jinkinson:

Q. Now, do you make any attempt in your study, services between the chains and independents, to trace the billing, method of billing chains? Do you allocate an expense for that?

For example, do you understand my question?

A. Yes. I want to be sure I understand it. Did we, for example, go into the offices and make a detailed step-by-step analysis in what was involved in billing?

Q. Yes. The cost inherent therein?

A. Yes, many things at the Bowman Dairy Company. We looked at that again from a management standpoint as to procedures and methods. We did not include any of those office-differences in our suggested manual.

I do not want to get away from what was the intended spirit of this manual. We did not suggest any complication of this manual by going into those office accounts because, again, I think that it involves clerical and office operations which would in turn require complex and, I am afraid, argumentive and arbitrary allocations of office space and time [fol. 130] and everything else.

You see, there is no limit to what we could have done. The point is that we tried to keep it as clear and simple and direct and uncontroversial as possible, because we were trying to provide them with a practice which would make it possible for them to keep this equity principle we talked about, something that would be manageable from an administrative standpoint.

If we extended it into the many things that might have been done, at least in my judgment, was to take detail beyond the necessity.

Q. Well, is it true that in servicing a chain store—withdraw the whole question.

Did you make a study to determine the method whereby a chain store receives milk or merchandise from the Bowman Dairy Company in respect whether or not the manager had to O.K. the delivery?

A. No; that was driver's time and truck time again, and we tried to get the slip-signing time and the several transactions in the time study; that is right.

Q. And the manager at each chain store had to finally sign the slip presented to him?

[fol. 131] A. That was assumed to be standard practice.

Q. Now, the slip went back with the driver showing the amount of merchandise delivered that day?

A. That is right.

Q. And he turned it into the division office?

A. As I understand it, yes. The flow chart on those individual procedures is not indelible in my memory, now, but I think what you have said so far is substantially correct.

Q. And those slips representing the merchandise delivered by Bowman were then sent to the central office and posted?

A. They may be posted at the divisional level and brought up to a money total. I do not know whether then or now how far the division office goes and how far the home office goes, but one place or the other; it is reasonable to assume that was done.

[fol. 132] Q. All right. But by the end of the month they all accumulated in headquarters, so one bill was sent to A&P or other chains?

A. Yesterday you asked me about procedures for billing to A&P, and I think I mentioned then that the exact billing procedure to A&P was not a specific thing we included in our observations; that is, we did not trace through in an auditing sense the billing steps of the accounting entries.

So I want to be very careful that I don't agree to anything I don't know. I do not know on the basis of any of these observations or on the basis of the suggested managerial procedure for keeping prices equitable the billing practice that from time to time has been worked on or the billing frequency, for that matter, had from time to time been worked out between Bowman and A&P.

Q. Now, you also have an item in your study concerning special deliveries of milk to independents, is that right? I think it is on page 8 of the manual.

A. Page 8 of the manual?

Q. Yes: "Call back later in the day to deliver more

merchandise if refrigerated equipment cannot accommodate the entire order at once."

[fol. 133] Now, in your study of deliveries to chain stores, did you ever find that any special deliveries were ever made to chain stores?

A. I have not scanned the data for that particular point, but from a practical standpoint you could assume that it might have happened. I could assume that it did happen. But I think I can give you this assurance, that if it had happened with great frequency—I am reasoning now from the logical way we put our calculations together,—but if it happened with great frequency we would have included it in the standard for chain stores.

Q. I see. But you admit that it may have happened, and probably did happen, right?

Mr. Hart: There is no question about that.

The Witness: That is just a common sense answer.

By Mr. Jinkinson:

Q. Is that reflected in any place in the study?

A. You mean in this proposed manual, did we ask them to recognize the fact that chain stores might get special deliveries?

Q. Yes.

[fol. 134] A. No, I do not believe so.

Q. Yet it is one of the items which you include in Page 7 as the option service which the independently-owned stores generally want.

A. I don't think "generally want."

Mr. Hart: I don't think that is what you are talking about at all.

The Witness: I can't say "generally want." All I can say is where it occurred we took the time for it.

By Mr. Jinkinson:

Q. But you did not take it in reference to chain stores?

A. Because from the standard practice standpoint it was not considered among those things they require with frequency necessary to recognize it in this manualized attempt to anticipate what services are required.

Mr. Hart: Well, if it occurred, did you take it? I mean, if there were instances in the days that you studied of a chain store call-back, did you calculate it?

The Witness: I would like to go back through the data to see if it did get in.

[fol. 135] By Mr. Jinkinson:

Q. Well, the point is, where would it show up in the manual?

Mr. Hart: Isn't that true in Bergfeld Exhibits 7 and 8?

The Witness: Well, Bergfeld Exhibits 7 and 8 has independents only. I would like to go back and check that.

By Mr. Jinkinson:

Q. Well, here is the point I am trying to make: As I understand it, this whole study is built on the theses that the elements appearing on Page 3, Bergfeld Exhibit 1, Paragraph 1, from A to K are all applicable to chains and independents alike, that the justification for any discount is found in Paragraph 2 on Page 3, Bergfeld Exhibit 1.

Now, we turn to Page 7—Is that right?

A. Well, again we come back to what I mentioned yesterday. There are two things that enter into the differences in margin available from a chain store and margin available from an independent.

Q. Those are the two things which appear on Page 3, Bergfeld Exhibit 1?

A. Well, also the extent to which the volume taken in [fol. 136] number of units——

Q. I am speaking of each level of volume.

A. What?

Q. I am speaking of each level of volume

A. Oh, given to the same in volume?

Q. That is right.

A. All right, that will help me.

Q. Yes.

A. For similar volumes the main differences are the differences between 1 and 2.

Q. Appear in 2 on Page 3 of Bergfeld Exhibit 1?

A. That is right.

Q. Now, I direct your attention to Page 7. You say "experience has shown that the independently owned stores generally want the optional service, which may include some of the following work elements."

Then you list them. Over here you list as one of those elements, "Call back later in the day if the refrigerated equipment cannot accommodate entire order at once."

A. Yes.

Q. Now, you list that in the independent services, but you do not list it for chain stores; yet you admit that chain stores on some occasions do have special deliveries or have [fol. 137] trucks call back again.

Mr. Hart: Well now, I do not know.

The Witness: I do not think I said quite that.

Mr. Hart: There is no mention that the refrigerated equipment at the chain stores is not sufficient to accommodate the entire order.

By Mr. Jinkinson:

Q. Let me ask you this question: What does that have to do with the driver's time? He has merely got to re-deliver more milk.

Mr. Hart: If you assume that there is no sufficient refrigerated equipment to accommodate the entire order, then obviously he is going to have to make a second trip at some later time. But there is no reason for an assumption that that is true of these chains.

Mr. Jinkinson: I am not assuming about the refrigerating service in either event, whether a store does have sufficient refrigerator or not, the truck has to make two trips. [fol. 138] Mr. Hart: Well now, you are including special deliveries. As I understand this item, it does not include special deliveries. This is regular.

Mr. Jinkinson: Well, I think we are arguing about a distinction without a difference.

The Witness: I think there is a difference, Mr. Jinkinson, which is more than a word difference. You see, as I understand it, the Bowman Dairy Company does have on reserve at various divisions a service where if a customer does run out in the course of his day's business, and calls as an emergency and wants some more, it has been their ex-

perience it has been good business to go out and make a special trip with a special truck for a special delivery.

Now, that is in the parlance, I think, of the Bowman Dairy Company, and is called a special delivery, a specific definitive type of service.

Now, I think there is another type of second delivery, if [fol. 139] you want to call it that, which is the call-back by the regular truck and the regular driver because of limitations encountered or difficulties encountered in the first delivery. So that is, I think, a distinction.

By Mr. Jinkinson:

Q. Are you familiar with the bylaws of the Milk Drivers' Union, Local No. 753, of Chicago?

A. Generally, sir.

Q. Are you familiar with Section 58?

A. No, sir.

Q. It reads as follows——

A. No, sir; I would not remember that one.

Q. It reads as follows. Section 58: (reading)

> "It shall be a violation of the rule for members to make two deliveries to the retail trade dairy stores, stores included. Where members are found guilty of such violations they shall be fined not less than $10 for each offense."

(Discussion off the record.)

Mr. Jinkinson: All right, let's get back.

[fol. 140] The Witness: But we are correct that I did not admit that I had seen these occur: I said I think probably they might.

By Mr. Jinkinson:

Q. Now, let's get down to that special delivery service and a part of the question of the sale and delivery of milk. Now, did you make any determination in your analysis of delivery on the part of Bowman Dairy Company as to what stores call for special delivery, whether an independent calls more frequently or whether chain stores call more frequently?

A. I do not have any details on that here.

Q. Well, did you make it at any time?

A. I cannot remember any specific study on that point, where the company as a whole made an analysis to see who and what size and what kind of customers required special delivery.

Q. Well, the accounting for time for special delivery does not show up in Bergfeld Exhibit 1?

A. That is right.

Q. That is right, you say?

A. Yes.

Q. Now, Mr. Bergfeld,——

Mr. Hart: Well, is that correct or is that in the general [fol. 141] cost?

The Witness: Well, he said the time.

Mr. Hart: Oh, the time. I see. Well, how about the money.

The Witness: Well, the accounting—let's go back to where we have the money.

Mr. Wooley: Schedule 6.

Mr. Jinkinson: Last page.

The Witness: In the accounting records as they are shown here, I think you will see that any special breakout is not a part of their regular accounting procedure, or at least a listing of these expenses.

Now, again it is a matter of how far one would go. For example, I want to ask your patience on the point, that to break down each one of these items, depreciation, gas, oil and so forth by each individual truck, whether it would be a special truck or a regular truck, and to break down some of these items as to just the amount which might have been created because of this accommodation of special delivery is, I think, not only laborious but in some cases impossible, [fol. 142] because locked in the past are those facts not so analyzed out.

And I think it is very probable, and that is why I was trying to answer your question before on this relative point, study might be required to see if there were any traces of this in the dollars involved. It would be a tracer-type of study.

Now, how much of the depreciation it is and whether or not the special delivery truck was an old one or a new one.

and whether it was a gas eater or whether it was the same as the other trucks, and all those things, is again a demonstration of what we are trying to do here, we are trying to give them something that is practicable for them to follow in this equity pricing objective of ours and not have them go beyond what seems to be practical in the way of cost of doing it.

These individual, more detailed analyses are, I am afraid, more laborious than it would appear. As a matter of fact, [fol. 143] to get the data up to this point has been quite a job in terms of man days.

By Mr. Jinkinson:

Q. Now, I am going to refer to Schedule 6 in Bergfeld Exhibit 1. Now, the first item represented there—incidentally, this is for November, 1954, the month of November?

A. Yes.

Q. The first item represented there is auto expenses.

A. Yes.

Q. Depreciation, I assume, means depreciation on all trucks used in the Elston Division?

A. Yes.

Q. Gas and oil represents gas and oil purchased for the use in those trucks?

A. Well, I think it really means probably more gas and oil used. They may at some time inventory those, I mean, just whether they are on an inventory or cash basis on gas and oil would be the only qualification to agreeing with your observation.

Q. Insurance represents the insurance on those trucks for those months and the license represents a proportional share for that month for licensing trucks used?

A. Yes.

[fol. 144] Q. Repairs and supplies I assume means just what it says, repairs and supplies of your trucks?

A. That is what it means.

Q. And repair and upkeep. Now, there was no rent. Now, that totals $9,894.35.

A. Yes, sir.

Q. And that is approximately six or seven per cent of the total amount?

A. Yes. Actually, well, it is better than ten.

Q. Between ten and eleven?

A. 99.85. I mean, you make your own choice of the figure.

Q. Just so it is approximate. Now, the salaries and wages, they represent delivery wages. Is that the cost of delivering the merchandise in that division for that month?

A. Those are the wages paid for the functionings from an accounting standpoint that they call delivery. It is not to be confused with a more precise definition of delivery or carrying that we refer to over here (indicating).

See, these are the natural accounts. That involves the payroll wages of people involved in the general function, and here the "Delivery" word means that general function.

[fol. 145] Q. And what does milk room wage mean? What people would be included in delivery wages beside the drivers?

A. I am trying to scan these other accounts, but I would think that there would be some relief and probably some supervision and some accessory indirect labor functions that would go with it.

Mr. Hart: That would include your assistant foreman, your foreman, your relief drivers.

The Witness: That is what I mean.

By Mr. Jinkinson:

Q. Your special delivery drivers too?

A. Yes.

Mr. Hart: That is a possibility too. It might in some instances include loaders.

The Witness: Well, the milk room here is a separate item, you see.

By Mr. Jinkinson:

Q. Does it all relate to drivers who drive on the route?

A. I would think they would be related, yes.

Mr. Hart: Well, that is the point I was making about loaders. Now, there is a jurisdictional fight between 753,

[fol. 146] which is the Drivers' Union and 754, which is the inside dairy workers Union, as to who will have jurisdiction of, for instance, loaders who load trucks within the building.

Now, in November, '54, I cannot tell you whether loaders were under milk room wages or under delivery wages, but they might well have been under either one of them, that is just a matter of time.

At the present time they are under 754, but it is my recollection that they were at one time under 753.

Mr. Jinkinson: Well, I take it that a driver does not load only his own truck then?

Mr. Hart: Many of them do, but some of them do not. I mean, there are some trucks with long hauls that are preloaded for them. I am not speaking particularly of Elston. I am speaking of general experience.

The Witness: I think it varies too from time to time.

By Mr. Jinkinson:

Q. Now, Mr. Bergfeld, state what milk room wages are. What does that represent?

[fol. 147] A. My understanding of that is that milk room wages involves the divisional milk room activities accessory to delivery.

See, that division—this is true of the Bowman Company—that division is a distributing division, as I understand it, and the milk room wages would involve all those working in the milk room activities.

Q. Doing what, for example?

A. Oh, handling cases and——

Q. Would it be filling bottles also?

A. No, no.

Mr. Hart: Not at Elston.

By Mr. Jinkinson:

Q. Putting them on the platform?

A. Yes.

Q. Anything else that you can think of that that would include?

A. Well, there are a great many things. I am just

wondering if it would not help you if we got a definition of the chart of accounts where all these questions would be answered in the way they are handled as entries in the books. I do not happen to have the chart of accounts with me. But that would give you an explanation in the great [fol. 148] detail you wish for each one of these accounts involved, the instructions, you see, as to where to post these various activities.

Q. Well, what does solicitors' wages include?

A. Well, the pay they were given.

Q. For what?

A. For whatever they did, whether they went out on an emergency call or whether they went out on a promotional call or a complaint. This is a total of wages for anything they did.

Q. And office salaries and wages include what?

A. The same thing, for their work.

Q. Now, vacation wages is included?

A. There again I think the chart would show how that was included.

Q. And personnel benefits include what?

A. Well, again, the usual benefits being paid to those receiving these salaries and wages.

Q. Now, what is the item "Total Commissions"?

A. Those represent commissions paid by commission agreements.

Q. Paid to drivers?

A. Yes.

Q. Now, the milk bottles, the bottling expenses. Item: [fol. 149] "Bottle Deposit."

Before going into that, what is the basis for calculating these total commissions?

A. That I think is in the most recent agreement. Again, it is based on the man's load. There is no commission, as I remember, for the first so many units of his load. Then there is a rate of commission after so many units and then an increased rate of commission later for additional units.

Q. In other words, based on the units he carries?

A. No, not entirely. As I say, the first units of the load are not considered commission units. In other words, there is no commission——

A. A unit is the measure used?

A. Only in the way—have we got a copy of that, because I think if we had a specific reference—I have not got a copy of it.

Mr. Hart: The Union agreement?

The Witness: Yes, on how the commission is to be paid.

Mr. Long: It is right here (indicating).

The Witness: See, that contained in there what you want. You see, it isn't really on units, it is on points. May I look over your shoulder?

[fol. 150] Mr. Jinkinson: Yes.

Mr. Hart: Points.

Mr. Jinkinson: Points.

The Witness: Well, it isn't on all of those.

Mr. Hart: Some things don't carry points and some things do carry points.

The Witness: It isn't all on points. The first points——

Mr. Hart: Some of them don't have any. Up to a certain point they do not carry any commission.

The Witness: That is right. I think that is stated in there.

By Mr. Jinkinson:

Q. It is stated there. Now, in the bottling expense you have an item, "Bottle Deposit." What does that represent?

A. Well, again, this is an account carried here on the deposits of the bottles themselves. See, this whole bottling expense, the division as we understand it, is charged for the bottles that they are given to work with, and they [fol. 151] are expected to return them. And in those calculations the bottles are given a value, and sometimes there will be more bottles or less bottles go back to the stores than originally went to them.

I mean, the bottles, losses, as such, —well, you are familiar with what happens to milk bottles sometimes. Sometimes they are not brought back and sometimes they are brought back.

And this is the ebb and flow of the surge of that old circuit of bottles in circulation. And money calculations for responsibility purposes are counted against Elston for what their ebb and flow was.

I assume you do not want me to get all the complexities of bottle trippage and loss.

Q. The item Bottle Loss, their expenses include bottle loss. Now, you have an item, Bottle Expense. What is the difference between Bottle Loss and Bottle Expense?

A. Well, I still wish that we could answer those from the chart of accounts.

Q. What is represented by Bottle Allowance?

A. Well, that again is this accounting for the allowances that are made for these various losses incurred in handling.

Q. That bottle expense represents $4,465.87, which is [fol. 152] approximately what, a twentieth of the total expense of the Elston Division, November, 1954?

A. Yes.

Q. Now, dropping down to other expenses——

Mr. Hart: I might say in connection with any of these, we are perfectly willing to exhibit the books for the determination of the exact items that go into these various things any time you want to look at them.

The Witness: The point is that it constitutes such a long answer, the only way to give a definitive answer is to read from the chart of accounts.

Mr. Jinkinson: For my examination, I am not questioning the accuracy, I am just trying to lay a predicate for questioning.

By Mr. Jinkinson:

Q. Now, can you answer this question: Does this bottling expense happen to be computed on the basis of so many cents per bottle involved in each store?

A. In each store, no. Again, it does not mean each store. It means of the total bottles.

Q. Used by the Elston Division?

[fol. 153] A. Yes.

Q. Now, dropping down to the other expenses, there is also sales contest expense, $800.

A. Yes.

Q. Then there is an advertising expense, $1,903.95.

A. Yes.

Q. There is building repairs, $48.30.

A. Yes.

Q. Is that at the headquarters of the Elston Division, do you know?

A. The Elston Division building, yes.

Q. Depreciation; that is on the building?

A. Yes; and in there there might be some other depreciation too, you know. It may include building appurtenances. Again, I will have to get back to the chart of accounts. It may be building appurtenances or furnishings, what is considered to be depreciable of the facilities used at Elston other than this depreciation up here (indicating).

Q. Other than the depreciation appearing under "Automobiles"?

A. Yes.

Q. Then you have an item "Equipment Repairs." Is [fol. 154] that on the equipment of the Elston Division?

A. Yes.

Q. Then you have Ice and Refrigeration. Is that at Elston Division headquarters, ice furnished drivers?

A. All these were given to us as being at the Elston Division.

Q. And you have an item of Insurance. Is that insurance. Yes, insurance, $5.71. And Laundry, seven, sixty-nine.

I assume that is for laundry at the Elston headquarters?

A. That is our assumption.

Q. And licenses, $268.58?

A. Yes.

Q. Is that State or County or local license of some kind?

A. Again, the chart of accounts would tell us exactly, but that would be my understanding.

Q. Miscellaneous expenses, eight forty-nine, twenty, covers almost anything?

A. Anything except for other items specifically enumerated.

Q. O.K. You have office supplies and expenses, $22.95; Operators' Supplies, fifty-six seventeen; Rentals, $10; [fol. 155] Taxes, $423.30; Telephone, two sixty-six fifty-three; Trade Expense, one sixty; Utilities, sixty-nine seventeen; Vending Machine Expense, $42 and Store License, $6.

Those items appearing under other exhibits total $6,613

even. That represents approximately seven per cent, is that right, of the total expense?

A. I have not calculated the percentage but it represents approximately whatever it is.

Q. Do you know whether or not the bottle expense represents losses incurred at the store as well as at the division headquarters, as well as bottle allowance paid to the various stores for bottle returns? Do you know that?

A. There again I would have to assume that it did for that reason, that when a bottle is gone it is very hard to decide where it's gone. All that is accountable is that it is not there. Well, I think you see my point.

Q. Now, I direct your attention to Schedule 2, Page 1 of Bergfeld Exhibit 1.

A. Schedule 2, Page 1.

Q. As I understand, it is the ultimate culmination of all of the studying you have made in your manual, Bergfeld [fol. 156] Exhibit 1, is formally used?

A. These are the standards, yes.

Q. Now, in looking at this Page 1 of Schedule 2, Bergfeld Exhibit 1, how many items appearing thereon are taken into account in finally determining the total time of delivery for independents?

For example, "Get Order." That is included in the independents?

A. That is right.

Q. Delay to get order, customer service?

A. Yes.

Q. Make up order slip?

A. Yes.

Q. Have slip checked?

A. Yes.

Q. Route bookkeeping?

A. That is right.

Q. Collect is included?

A. That is right.

Q. Delay to collect is included?

A. That is right.

Q. Drive on route?

A. That is right.

Q. Load cases at plant is included?

[fol. 157] A. Yes.

Q. Select merchandise is included?

A. Yes.

Q. Unload order is included? Sort bottles also is included?

A. Yes.

Q. Pick up empties?

A. I think you skipped a column.

Q. Delivery? All right. "Delivery" is included?

A. Yes.

Q. And sort bottles also is included?

A. As shown here?

Q. Yes. Pick up empties?

A. Yes.

Q. Load empties on truck is included, right?

A. Yes.

Q. Arrange loads is included?

A. That is right.

Q. Unload cases at plant is included?

A. That is right.

Q. Of all these items which are included in the independents' calculations, what are not included in determining the ones formerly used by the chains?

A. Well, that goes to the points we have mentioned [fol. 158] before.

Q. Well, name them again. Customers' service?

A. Yes. Those are the items that——

Q. And collect and delay to collect, is that right?

A. Yes.

Q. Now, returning now to Schedule 6 now, what is the figure appearing in the next to the last line, or the item appearing at the next to the last item, which reads, "Number of Route Days"? Now, what does that figure represent?

A. That represents the number of routes operating extended by the days they operate.

Q. For the Elston Division in the month of November?

A. That is right, yes.

Q. November, 1954?

A. Yes.

Q. Now, that figure is one thousand five hundred and seven, is that right?

A. One thousand five hundred and seven.

Q. Now, that is divided into the $84,657.55 which represents the total expense of the Elston Division for the month of November, 1954, does it not?

A. Yes.

[fol. 159] Q. And you get an item entitled, "Cost Per Route Day" of $56.18, is that right?

A. Yes.

Q. Now, on Schedule 2, Page 2, Exhibit 1, is an item appearing, "Total Delivery Cost (15 cents per minute)." Now, how is that arrived at?

A. Well, that is arrived at by going back to the number of minutes used in direct—let me see. Let's go back, Bob, can you help me find the page I am looking for. I am just looking for the page in which we showed where the productive time on the routes is divided by the amount per route day.

Mr. Havemeyer: Page No. 5 of the manual.

The Witness: You see, what we say there is that for each of these routes there is a combination of two things. There is "Make Ready," and "Personal Time" and "Time for Customer Service."

And we explain there that some of these things the driver does is preparatory and personal rather than of direct service. And it is the direct service time which we use here to determine in this demonstration on 5 the calculation for each route, the quotient of the cents per minute [fol. 160] of customer service time—see, that is a fairly common practice again in costing.

By Mr. Jinkinson:

Q. Go ahead.

A. You see, in almost every sort of a task there is a preparatory and make-up time which does not produce any end service or product.

And so the cost for the end service or product has to be reckoned on the productive time required to provide it.

So we have divided the cost of the route day by only those minutes found to be available for the direct providing of services, in search of a more accurate value for those service minutes, in search of a more accurate value for those service minutes than if we have this thing mixed

up with all these incidental things that are not direct services.

Q. Now, I understand that Page 5 is merely an illustration of how you arrive at this fifteen cents per minute which appears in Schedule 2, Page 2?

A. That is right; that is another part of this manual.

Q. That is right.

[fol. 161] A. I would like to get some water in a minute, if I may.

Mr. Jinkinson: Let's take a short break then.

(A short recess)

By Mr. Jinkinson:

Q. Well now, Mr. Bergfeld, you use, I notice, on Page 5, down here in your example, the figure fifty-six eighteen. The same figure appears on Schedule 6, isn't it?

Mr. Hart: Yes. Now, the last figure in 6.

The Witness: You say "in our example."

You understand this manual is all an example. This is a demonstration of technique, this is a manualization of procedure, and we submit it as an example.

By Mr. Jinkinson:

Q. Why did you arrive at the total delivery cost as fifteen cents a minute, as on Schedule 2, Page 2? Is that an example or an actual figure?

A. No, see, that is another example. These examples given in this manual are an attempt to formalize specifically these procedures.

[fol. 162] Q. Well, let me ask you this question then. Appearing on page 5 in your example, how did you measure the 417.3 which you use as a denominator in the division of 5618 and 417.3?

A. This is to be an example of how the time standard can be applied to a route for the determination for the 417.3. That is, in other words, we take the total of the customer service of the elements defined as customer service as they would be predetermined and required for the customer mileage and product content of the route and determine its time content.

Q. In accordance with these formulae which appear on Schedule 2, Page 2?

A. These time drivers. I will wait until Mr. Wooley finishes because I want to be sure we are talking about the same thing.

Q. Did you use the formulas which appear on Page 1 of Schedule 2 and Page 2 of Schedule 2?

A. Yes. That is not quite a formula, but those standards are the things used.

Q. Appendix A would be the formula. Those standards were used?

A. I think I can explain it in this way. Here we have got a man doing many things during the course of a day. [fol. 163] Through his functions the company is providing products and the company is providing services. And this whole cost is a combination of products and services.

Now, to make them additive we have to reduce them to a common denominator that will measure the miles compared with the slips signed and compared with the cases carried. We have to get them all back into something where we can relate them one to another so we can get at them for costing purposes.

Now, I do not want you, for my own professional good. I do not want you to think this is an experimental procedure. That is very common in manufacturing and distribution functioning. I mean, when you are measuring the output of a group of men in manufacturing activities, they may be making a great many varieties of things and doing a great variety of jobs during the course of a day.

Well then, to get back to the measurement of the cost, you have to get them in common terms, and that is what this whole thing is a demonstration of, a very well established technique taking the time equivalent for the task at a rate per unit of time to determine its cost.

Probably a good part of that wasn't necessary. I just [fol. 164] wanted to give the principles and the application of established practices in exhibit 1 here that we are trying to get demonstrated. This whole thing, Exhibit 1, as we referred to it, is that demonstration.

Q. But they are related in this formula appearing on Schedule 2, Page 1 of Schedule 2 and Page 2 are related to the Schedule 6, that the formula appearing——

A. Schedule 6?

Q. Yes. In that formula, it is applied against the total expense of doing business in the Elston Division.

A. The figure 5618 from Schedule 6?

Q. Yes.

A. Is brought together with calculations similar to that on page 5 and demonstrated on Page 5 to determine the cost per customer service.

Mr. Hart: As I understand it——

The Witness: That is shown here on the page, see? The number 5618 is divided by the 417.3.

Mr. Hart: But the time and example on 5 are purely arbitrary examples?

The Witness: Yes, the whole thing is an example.

Mr. Hart: I mean, those do not come from some actual [fol. 165] happening, they are just some figures that somebody picked up to show the example?

The Witness: That is right; that is right; we are demonstrating the technique. You see, within the Bowman organization there have been parts of these things that we have talked over with parts of the organization, depending upon their responsibility and their cognizance. Now here is the pulling of all those advisory discussions together.

By Mr. Jinkinson:

Q. Now, in reality then, it works this way: The procedure in applying the formula, you apply the work element formula as it appears on Appendix A, Page 1——

A. Appendix A, Page 1? Yes.

Q. You apply the work element formula appearing under Appendix A, Page 1, to each store, each route, to determine the total driver time spent in each store, is that right, for the day?

A. The effect is substantially that, yes.

Q. And, 2, then you total, you take the sum or total of all such drivers' time for all stores and routes to obtain the total time for the purpose of—or for the Elston Divi- [fol. 166] sion, and this represents—the total represents this 417 appearing on Page 5?

Mr. Wooley: By way of example.

By Mr. Jinkinson:

Q. By way of example.

A. Yes, that is the idea.

Q. Which are used to obtain the cost per minute used in Schedule 2, here? (indicating)

A. Demonstrated in Schedule 2 for arriving at a money value for the time units so covered?

Q. That is right. And that would be the total that appeared?

A. There are some little qualifications I could make, but in general that is the idea.

Q. That is the way it works?

A. Yes.

Q. Now, that means, does it not, that in the fifteen cents which appears as an example on Page 2 of Schedule 2, that a percentage of that fifteen cents is represented by whatever percentage the total items on Schedule 6 is to the figure of $84,000, the total cost, for example?

A. In considering the cost per minute, the expenses——

Q. A proportion of that fifteen cents is the same proportion as to what the various items, for example, auto ex-
[fol. 167] penses on Schedule 6 is $9,894, which is about ten per cent——

A. May I look at your book?

Q. (Continuing)—which is about ten per cent of the total of $84,657.55? It is approximately ten per cent?

A. Well, that arithmetic seems sound. That is, of the fifteen cents, if you wanted to get those expenses back in terms of expenses per minute, and you went into the distant decimal places for each one of those in the fifteen cents you would rightfully expect that they would constitute of the fifteen cents the same proportion that they constitute of the total.

Q. That is right; and that would be about ten per cent of the fifteen cents?

A. Well, whatever they would be, but I think we understand one another. The fifteen cents is that quotient.

Q. That is right.

A. And the same thing with reference to the bottle expense.

Q. Would be the same proportion to the fifteen cents,

percentagewise, as it is to the $84,000 which appears there?

A. As it is demonstrated there.

[fol. 168] Q. Yes. The same thing is true of other expenses which total $6,615, would be the same proportion to the fifteen cents as the $6,000 is to the $84,000, which appears in Schedule 6.

A. Yes, I think we understand one another on that. That is the technique. That is the intentional desire, if you will.

Q. Now, the column appearing on Page 2, Schedule 2, represents the drivers' time or total delivery time, isn't that right?

A. As designated?

Q. Yes, as calculated for each classification per store volume?

A. Yes, that is the intention there, that is the total of the detail that precedes the total on left to right.

Q. Now, you take the fifteen cents and multiply the total, the total drivers' time, which is in the first example, I mean, the first line, 12.232, and you get 183.480, is that correct?

A. It is intended to be an extension.

Q. Yes. And it is extended all the way down that column, every number appearing under the total delivery time, multiplied by fifteen, you get the result, the total delivery cost as appears in the adjoining column?

[fol. 169] A. That is right.

Q. Now, in effect what you are doing is taking the proportion——

A. Is that Schedule 6?

Q. Schedule 6; the proportion of drivers' time or delivery wages as appears in Schedule 6, and applying that percentagewise——

A. The time doesn't appear on Schedule 6, the money appears.

Q. I mean the money, the proportion of it, whatever $31,608 is to $84,000. I am just asking about the first item, $31,000. You are taking whatever percentage the $31,000 is to the $84,657.55 appearing in Schedule 6 and applying it to the drivers' time in each instance. In other words, it is a part of the fifteen cents?

A. Yes, that is right.

Q. And you do the same thing with each of the items appearing on Page 6?

A. That is the object.

Q. Of Bergfeld Exhibit 1?

A. That is the idea.

Q. Each of the items appearing all the way through there?

Mr. Long: Of Schedule 6?

[fol. 170] Mr. Jinkinson: Of Schedule 6, yes.

The Witness: That is the idea.

By Mr. Jinkinson:

Q. Therefore, you are assuming that the bottle expense is as it appears in its relation to percentage, to the total figure $84,657.55 is being distributed in the formula on the basis of drivers' time, is that right?

A. That is right.

Q. And that is true of each and every item that appears on Schedule 6?

A. Yes. I think the costing principle, the costing formula that is applied to the problem, I mean—I am beginning to be understood now, and that is why I keep going back to this business of units.

Q. Now, Mr. Bergfeld, what relationship does the—in reality, does the item "Bottle Expense" as it appears in Schedule 6 have to driver's time, time which he spends at the store in making deliveries?

A. Bottle expense, like all these expenses, must be recovered during these delivery service times, and it is again comparable to a very standard practice in the industry.

We take these expenses as representing the facilities, [fol. 171] the requirements for providing the delivery services of the route. This is our cost of being in that kind of business at Elston in the month. These are the problems that are faced at the Elston Division during a month.

In other cost environments it is sometimes called the overhead.

Q. But the expense——

A. I paused because I was afraid you were not listening.

Q. Oh, yes, I am listening.

A. (Continuing) The costing technique demonstrated here is that which has been used in product and costing services pretty generally, and that is, you take the cost of supporting the function and divide those expenses of supporting a function by the unit work measurements involved in the function, and thereby determine the costs of the services performed in the function. And this is a fairly standard practice of getting a costing rate in terms of a unit product service rendered. The unit of product of service rendered in this case, because it is primarily a service being rendered, we have not said anything about differences in the product [fol. 172] cost—is time; and to provide the time for those services, the expenses listed, as an example, for Elston for that month are the expenses required to provide the environment for those work elements to be done.

And bottle losses are among the things that the company incurs as the cost of providing that environment.

Q. Now, as I understand it, the differential between discount granted chains and granted independents is based solely, or mainly, upon the elapsed time the drivers spend in making delivery, is that right?

A. In principal, I think your statement is practically correct.

Q. But let me ask you this question: Are bottle expenses created by the drivers' activities?

A. Well, these bottle losses occur in the environment activities, yes, and we have to expect some bottle losses from his delivery and serving functions.

You see, it would be unrealistic to not face the realities of the things that are going to cost money as he goes on in the course of his assignment.

And these things do cost money, as shown in examples for that month. I want to make a full explanation.

[fol. 173] Q. Now, what possible relationship could there be between drivers' time at a store and advertising?

A. In order to have his time at a store be effective. It is not relationship between his time at the store, it is in relationship between what he does in the store, what he is expected to accomplish at the store.

As a matter of business practice, they feel that his time and efforts there have to be supported by bottles and depre-

ciation and advertising and other things that are scheduled there.

Without those it is assumed that he would be less effective. You asked for a relationship. It is creating environment for him to make his time most fruitful.

Q. As I understand it then, you are saying that all of these necessary items which appear on Schedule 6 of the cost of doing business at the B wman Dairy Company which provide him the opportunity, the driver, to be in one of these stores and spend time, is that about what it amounts to?

A. Well, I think if you will look at them as the supporting factors to make his time effective in the store, I think that—[fol. 174] Just as a man in the plant—now, wait.

See, these work functions, whether they be in milk distribution or the operating of a drill press in a factory, the assembling of component parts on an assembly line, those activities of the work units being performed cannot exist in a vacuum; you've got to give them an environment to exist in.

These are the things that are necessary or at least have to be used. I am not prepared to say the exact essentiality of each one of these, but from the standpoint of good business judgment they consider or at least they faced and paid for these factors in the environment of the drivers' route day to support his route activity and the things on which he spends his time.

Q. Are you saying they have a remote relationship but not a direct relationship?

A. I am saying they have a very direct and essential relationship, not remote by any means, because I do not know—let's go down the items. I do not know how a driver could perform his time unless these facilities were made available to him, trucks and bottles and all the things.

[fol. 175] Q. That is very true, but when you get down to the allocation of the differences between given discounts between chain stores and independents, the only item you are taking into effect is the driver's time?

A. No, sir. Excuse me. That is not quite true. We are using the time measurement as the basis for taking into effect everything that was paid for to render those services, as you pointed out with me just a moment ago, the items

listed, proportional and so forth, on the schedules that we discussed it from.

I think, as I said before, these are the supporting activities paid for to provide the facilities and the environment necessary for his time to be effective. We cannot have him just walking around unimplemented, going through the spending of minutes.

Q. Well, take the item of auto expenses in Schedule 6. Now, you want to relate that item, percentagewise, whatever the item is, to the total expenses to Schedule 2, Page 2.

A. You said I wanted to what, please?

Q. You do relate that expense, as it appears, to the total expense, as it appears as to the total expense of doing business at the Elston Division in November, 1954?

[fol. 176] A. We included it.

Q. Percentagewise, whatever percentage that is.

A. We included it on the basis of the calculation we reviewed a minute ago.

Q. Now, did you ever make any study—or would it not be a better study, to relate that expense to tonnage miles carried by the trucks for customers?

A. Well, now, I am going to venture an opinion as to whether I think it would be better for tonnage miles carried, which is what you have asked me to do.

Q. That is right.

A. My opinion is no, it would be a less accurate and less useful basis on tonnage miles carried for this reason, that our costs are not determined and should not be on the basis of how many tons we can put on a truck.

Our costs have to be determined on how much the man can take off the truck in the time he has got available for taking it off after and including all the other things he had to do with that time.

Our problem in the milk business——

Q. Part of that function of the driver, of course, is to get the merchandise to the store, not just unloading it?

[fol. 177] A. That is right, that is why I say all the other demands on his time—Our problem in this milk industry as I see it through my client is not to load up the trucks. We could load up the trucks and get a ton mile cost on a loaded truck at the point where the actual load would be considered

within the range of the safety regulations that applied to trucks.

That is not what determines what we get on a truck. What we get on a truck is what we can have the man take off and get to the customers, and what he can take off and get to the customer is based on how much time he has got for that function, considering all the other things too that are required.

Furthermore,—Let me make this observation. Here is another reason why I do not think it would be right. That costs for carrying do not always stay in a proportional linear relationship such as you have indicated on proportions on that schedule for ton miles.

For example, we can take a given truck at any time of the day and half load it, and we will not find a substantial decrease in the gasoline it consumes. And you won't find on a half-loaded truck a substantial difference in the depreciation required to provide for the retirement of the vehicle.

[fol. 178] Even if you took ton miles between two different vehicles that were completely loaded, a lighter vehicle and a heavier vehicle, you would not find that there was a proportional—I do not believe you will find—I have not done this, this is an opinion, but it is a fairly strong opinion found in grappling with this sort of problem for quite awhile;

You would not find that the operating costs per ton mile of a five-ton truck is half what the operating cost per ton mile is for a ten-ton truck. This has been the thing we worked on for fifteen years. How do you get to a unit that does mean something?

I might say that ton miles is among several units that have in the past been considered and, at least in my opinion, rejected. This again is not a procedure that is unique and experimental in this demonstration. This is a fundamental procedure that we have used with other clients on basic business problems, and these other studies I mentioned to you the other day where we have worked on problems for State Governments who were trying to decide what the right costs and price determinations would be.

I did not mean to go off for so long, but I would like to [fol. 179] have you share some of my real doubts that ton miles would do it. Again, it is not the tons you put on, it is the amount we can take off.

(Discussion off the record)

By the Witness:

A. (Continuing) The point here is, what we are trying to determine here is the cost of distributing milk, not the hauling cost per ton mile.

By Mr. Jinkinson:

Q. All right now, referring to your study, in the price study of certain bulk wholesale customer transactions of the Bowman Dairy Company, dated March, 1956, which I will mark Bergfeld Exhibit No. 3——

A. Let's see. We are going into a whole separate thing here, the bulk. Bob, would you help me find copies of that report?

(Discussion off the record)

The Witness: There are some other points on this philosphy of costing that I would like sometime to have an opportunity to make.

Mr. Jinkinson: Well, you can put this on the record, that if it is necessary, you can count on your very able counsel. [fol. 180] Mr. Hart: Count on me for helping you.

Mr. Jinkinson: We will see that you have an opportunity.

By Mr. Jinkinson:

Q. Now, directing your attention to Schedule 3, Bergfeld Exhibit No. 3, you have an item there——

A. Schedule 3 on Page 3?

Q. Of Bergfeld Exhibit No. 3. There is an item of wages of solicitors.

A. Yes.

Q. Now, you also have an item in Schedule 6 of Bergfeld Exhibit 1 in which an item appears "Solicitors' Wages."

A. Yes.

Q. Now, do these solicitors, as listed in Bergfeld Exhibit No. 3, and the solicitors listed in Schedule 6 of Bergfeld Exhibit 1, are their duties different?

M. Wooley: Significantly different.

By Mr. Jinkinson:

Q. Significantly different?

A. Let me discuss some differences and have you decide on their significance. The solicitors indicated on Schedule 2 of Exhibit 3—Are we calling this 3?

Mr. Hart: Bergfeld Exhibit 3.

[fol. 181] By the Witness:

A. (Continuing) Bergfeld Exhibit 3, Schedule 3; these solicitors work in really quite a different market environment than the solicitors in Schedule 1—Schedule 6; Bergfeld Exhibit 1.

They are really selling products to a buyer who does two things. This bulk buyer referred to in Exhibit 3 resells the products, some of them, as packaged and processed direct to consumers, which could be considered analogous to the customers solicited by the solicitors mentioned on Schedule 6.

But in addition to that, and this incidentally introduces quite a complexity in my opinion of those solicitors' jobs. They sell products that in turn are further processed at the restaurant level by, as you know, chefs and cooks and so forth, who in my experience take pride in whatever they are trying to accomplish by their processing and, therefore, frequently bring to bear on the supplier a whole series of problems considerably more complex than the solicitor has to resolve with the store customers.

I mean, they want their product, for example, sometimes at slightly different hours of the day to conform to their baking cycle.

[fol. 182] And sometimes they are particularly—as I understand it, again, though I have not talked to any of these chefs or cooks. This is just experience in the milk industry. They sometimes want them just a little different, or they have a particular temperature idea as to when they want it and the way they want it to arrive.

And very often when our products are mixed with many other products and then the result is not just what they hoped for, why, then it is a matter, I believe, of these solicitors having to help them find the reason. There is a whole

new series of significantly more complex problems involved in bulk sales, in my opinion, than in just a straight sale, where a processed product is involved.

So I think therein might lie some significant differences.

By Mr. Jinkinson:

Q. All right now, in your Bergfeld Exhibit 1, the solicitors' wages were merely an item on Schedule 6

A. Right.

Q. (Continuing) and ultimately was applied to the

A. Cost per minute.

Q. Cost per minute by the formula set forth in Schedule [fol. 183] or Page 1 and Page 2 of Schedule 2; is that right?

A. I think the schedule numbers are right on that. They were ultimately applied.

Q. And that resulted in being applied to the drivers' time at the store?

A. That is right.

Q. Now, on Page 12, Bergfeld Exhibit 3

A. Page 12?

Q. Yes.

A. Yes, sir.

Q. You applied the solicitors' time to your cost study and delivery of bulk wholesale in an entirely different manner, you applied it directly, didn't you?

A. I believe that is right.

Mr. Jinkinson: I believe that is all.

Mr. Bergfeld: Thank you very much.

(And Further Deponent Saith Not.)

[fols. 184-185] Notary public's certificate (omitted in printing)

[fol. 186] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1961

No. 439

UNITED STATES, Appellant,

vs.

THE BORDEN COMPANY, ET AL.

Appeal from the United States District Court for the Northern District of Illinois.

ORDER NOTING PROBABLE JURISDICTION—December 4, 1961

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

☆ U. S. GOVERNMENT PRINTING OFFICE 1962 62805T 923